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# GE OF GOODS BY SEA ACT (COGSA) S. 943 AND H.R. 2005, THE DEATH HE HIGH SEAS ACT (DOHSA)

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## HEARING

BEFORE THE

OMMITTEE ON SURFACE TRANSPORTATION AND MERCHANT MARINE

OF THE

## COMMITTEE ON COMMERCE, IENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

APRIL 21, 1998

he use of the Committee on Commerce, Science, and Transportation

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# THE CARRIAGE OF GOODS BY SEA ACT (COGSA) AND S. 943 AND H.R. 2005, THE DEATH ON THE HIGH SEAS ACT (DOHSA)

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**TUESDAY, APRIL 21, 1998**

U.S. SENATE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION
AND MERCHANT MARINE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 4 p.m., in room SR–253, Russell Senate Office Building, Hon. Kay Bailey Hutchison (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: James Sartucci, professional staff member; and Carl Bentzel, minority counsel.

## STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Senator HUTCHISON. I do apologize for this wait. Sometimes you cannot plan these things. And it happened that it was my amendment that was the last one being voted on, so I had to stay and finish that amendment.

I am going to not read my opening statement, but let me just say that I am very interested in hearing from all of you. Because I feel very good about what we have before us. And I think the Maritime Law Association has done an excellent job of taking all of the interests into account. But I understand that there are still some areas of disagreement. So I am hoping that you will say for the record what you think are the pros of the bill, and then I know that some of you—at least I know Mr. Woodruff—will have some concerns. And I would hope that we would be able to listen to those and hopefully be able to go forward with a bill that will be good for everyone, or at least an improvement for everyone.

So, having said that, let me just let you all start, and not keep you waiting any longer. And we will start with Mr. Chester Hooper, the immediate past president of the Maritime Law Association.

Mr. Hooper.

[The prepared statement of Senator Hutchison follows:]

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Welcome to Washington. I am pleased to be holding today's hearing and appreciate your testifying before this committee. This oversight hearing will give the committee a chance to learn more about important proposals that would affect how we allocate risk and liability for maritime cargo loss or damage and wrongful death on the high seas. We will be discussing two issues today, The Carriage of Goods by Sea



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Act and proposed legislation that would affect the application of the Death on the High Seas Act. The first panel will discuss the Carriage of Goods by Sea Act (COGSA).

COGSA is an old law that has proven its usefulness over the years. Enacted in 1936, COGSA has served as the means to allocate risks between shippers and carriers for over 60 years. Thanks to COGSA, we resolved some of the early liability questions that confronted carriers and shippers. However, as with most things, this law needs to be updated to reflect changes in the industry. I am here to listen and learn more about industry's concerns about the need to update COGSA..

In particular, I am interested in hearing about the shifting liability standards and how this will interact with international protocols. The current international standards are conflicting and provide for some confusion. I look forward to hearing how we can help lead the world into developing new liability standards that are fair to shipper and carrier alike. It is important for me to hear the pros and cons of requiring the U.S. to get out in front of the international community by modifying COGSA before the international community acts.

The Maritime Law Association has proposed several changes to the current law. The Maritime Law Association proposal would change the application of COGSA from the period during which the goods are onboard the vessel to the entire period from when the goods are received by the common carrier to when the goods are delivered. This change would allow a uniform multi-modal cargo liability system and would presumably simplify cargo liability laws. I look forward to hearing about how this proposal would affect current law governing the non-ocean transportation portion and how it would affect vessel and cargo owners.

In addition, the Maritime Law Association proposes to eliminate the "error in navigation" defense. At first blush, this sounds like a good idea to me. Currently under COGSA, shipowners are exonerated from damage to cargo due to the negligence of the vessel crew in the management or navigation of the vessel after it leaves port. I believe this defense was more applicable in an earlier era when ship owners had little ability to supervise navigation and management of their ships. However, with today's global positioning satellite and advanced communications, ship owners could more easily monitor and supervise the navigation and management of their ship. I also understand that bulk vessel owners have some concerns about this proposed change.

The Maritime Law Association proposal also increases COGSA's per package liability from $500 per package to the Hague-Visby agreement level of 666.67 Special Drawing Rights (SDR), or about $900, per package and adopts the Hague-Visby smaller definition of what constitutes a package. This liability limitation has served the important purpose of capping liability fees and preventing unequitable recoveries. Unfortunately, $500 today is not worth what it was 60 years ago when COGSA was. enacted and containerization has allowed an increased number of "packages" to be shipped in a single load. Thus, I can understand the need for increasing the liability limitation to an acceptable international nonn. I look forward to hearing from you how this will affect contract agreements and what kind of benefit it will provide to the cargo and ship owners alike.

The Maritime Law Association proposal contains two other significant points:

The Maritime Law Association proposes we amend COGSA to allow any party to require arbitration in a United States Court. This appears to overturn the Supreme Court's *Sky Reefer* decision that held that COGSA does not nullify foreign arbitration clauses contained in maritime bills of lading. This proposal would protect our U.S. shippers and cargo owners by allowing them to seek redress in a U.S. court instead of being forced to litigate in another country at great expense and often significant confusion regarding international laws.

Finally, the Maritime Law Association proposes to change COGSA to shift the burden of proof for the cause of cargo damage from the carrier to an equal burden among all parties. Under current law, carriers who deliver damaged goods face a presumption that they caused the damage. This presumption is limited to the liability cap of $500 and is subject to significant enumerated defenses. Under the Maritime Law Association proposal, all parties would bear an equal burden to prove what caused the damage. In addition, the court would apportion liability amongst the parties responsible for the events under a comparative fault rule. This places parties on a more even footing. However, I want to hear how this will affect the carriers and shippers and whether they feel a shift in the burden of proof is equitable.

I am hopeful your testimony will cover the points I have mentioned and you will discuss their impacts on your companies as well as how it affects those with whom you work.

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**STATEMENT OF CHESTER D. HOOPER, IMMEDIATE PAST PRESIDENT, THE MARITIME LAW ASSOCIATION OF THE UNITED STATES**

Mr. HOOPER. Thank you, Madam Chairman.

Our president, Jim Moseley, apologizes for not being able to be here. He is in London now, assisting our State Department in an IMO meeting there.

The Carriage of Goods by Sea Act, which we hope will become the Carriage of Goods by Sea Act of 1998, governs all contracts of carriage which involve carriage by sea. The kind of contracts it governs are bills of lading and similar documents and electronic contracts. It does not govern such private contracts as charter parties, contracts of towage and other private contracts. It does not govern purely inland carriage within the inland waters of the United States. It would govern carriage by sea.

We hope that it will act as a catalyst and a model toward world uniformity in the carriage of cargo. We have here a map, sort of a computer-generated map, showing the countries represented by different regimes of cargo interests. We see that have three major treaties governing various countries, and then one category of countries governed by all sorts of different regimes. This is very confusing in the carriage of cargo.

We reached this COGSA 98 by compromise. We have been arguing this—many of the people at this table have been fighting amongst themselves for about the last 20 years. We started in 1992 to work on a serious compromise. We involved all sectors of the ocean transportation industry. We all agree on the compromise as a whole. Each segment does not agree to each section of the compromise, but it is a true compromise. We all agree with it.

It will grant quite a few advantages to cargo interests and some to carriers. Cargo interests will get a higher limitation of liability. Cargo interests will be able to recover, in this proposal, the same amount of money their foreign competitors now recover in the courts of foreign countries. Cargo interests in the United States will not have to travel abroad to obtain that recovery.

We will eliminate the error of navigation defense. It has been much criticized. It has been on the books for a long time. We believe it is now out of step with the transportation industry, and should be eliminated. We think that will improve safety.

We improve burdens of proof for carriers. Carriers will be able to apportion liability with cargo if two or more events combine to cause damage. The carrier will not be left as he is today, bearing the brunt of that. The carrier's liability for receipt of cargo will improve. If the carrier does not know the quantity he receives and has no method to know the quantity he receives he can clause the bill of lading with "shippers load and count" or other language.

The carrier advantage will help all aspects of the carrier industry, the bulk carriers, break-bulk carriers and container carriers. It will improve the predictability for the multi-modal carriage of goods. Since ocean containers were invented, we see cargo carried by one or more ships, by trains, by trucks, and we see various regimes of laws governing each segment of this transportation. We see courts litigating things that we should not waste money litigating, to determine where the damage occurred, to determine the

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standard of liability to apply. COGSA 98 will apply the same carriage throughout the entire multi-modal system, doing away with that needless litigation.

We will retain the list of defenses which we have seen in the Carriage of Goods by Sea Act since 1936, and which we have been litigating in this country for the past 62 years. We will be able to rely on the present case law to interpret much of the new Carriage of Goods by Sea Act, thus assuring predictability.

We severely limit the choice of form clauses, so that a U.S. cargo interest cannot be denied access to U.S. courts because of the fine print on the back of a carrier's bill of lading. Those are basically the highlights of our proposal, Madam Chairman, and I would be happy to answer any questions you may have.

Thank you.

[The prepared statements of Mr. Hooper and Mr. Moseley follow:]

PREPARED STATEMENT OF CHESTER D. HOOPER, IMMEDIATE PAST PRESIDENT, THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Madam Chairman, my name is Chester D. Hooper. I am the Immediate Past President of The Maritime Law Association of the United States (MLA). Our President, James F. Moseley, regrets that he cannot be here today. He is acting, with our Second Vice President, William R. Dorsey III, as a pro bono advisor to our State Department at a meeting of the Legal Committee of the International Maritime Organization of the United Nations in London. I do have with me today, our First Vice President, Howard M. McCormack, the Chair of our Committee on the Carriage of Goods, Vincent M. DeOrchis, and the Reporter and principal drafter of the Carriage of Goods by Sea Act 1998, Michael F. Sturley, the Stanley D. and Sandra J. Rosenberg Centennial Professor and Director of Graduate Studies at the University of Texas Law School at Austin, Texas.

Thank you for the opportunity to appear before you today to explain a compromise that many sectors of the Maritime Industry in our country have been working on for the last six years. As Immediate Past President of the MLA, I also thank you for the opportunity to participate in the completion of the project I did not complete during my watch as President.

The present United States Carriage of Goods by Sea Act, 46 U.S.C. App. §§ 1300, et seq. (COGSA 36) was enacted in 1936 and is in serious need of updating. While the 1936 Act may have met the needs of that time for cargo damage claims, the marketplace has changed drastically in the intervening years. Other nations—our international trading competitors—have adopted laws more reflective of current needs. As a result of disadvantages contained in our 1936 Act relative to the carriage of goods laws of other countries, United States shippers and receivers of cargo must often travel to foreign countries to obtain the recoveries now available to their foreign competitors. Some ocean carriers' bills of lading even prevent, by means of choice of forum clauses, United States cargo interests from filing suit in the United States. The United States Supreme Court, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V SKY REEFER*, 515 U.S. 528, 115 S.Ct. 2322, 1995 AMC 1817 (1995), upheld foreign forum selection clauses in ocean bills of lading.

The Carriage of Goods by Sea Act of 1998 (COGSA 98) will eliminate the need to travel to foreign countries; it will increase the carrier's limitation to the same amount used by nations that represent about 70% of the United States foreign trade. COGSA 98 will overrule SKY REEFER and will render foreign choice of forum clauses void in most cases. COGSA 98 will thus solve these as well as other problems caused by COGSA 36. COGSA 98 may well form a model for other maritime nations to follow to restore world uniformity for the law governing carriage of goods by sea.

COGSA 98 is able to accomplish these objectives because it is a compromise amongst various sectors of the United States ocean shipping industry. No sector of the industry is pleased with all aspects of the compromise, but all sectors are willing to accept the compromise as a whole. All sectors of the ocean shipping industry realize that uniformity of maritime law must be restored and that COGSA 98 may provide a good starting point. Uniformity with regard to cargo loss and damage existed in a great majority of the maritime world when COGSA 36 was enacted by the

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United States. The unity was based on the Hague Rules[1] which were finalized in 1924. They were enacted domestically, with minor exceptions, as the United States Carriage of Goods by Sea Act in 1936, and were ratified by the United States with the same exceptions in 1937.

As technology in ocean transportation changed, and as inflation lowered the value of the treaty's limitation of liability provision, both the Hague Rules and COGSA 36 needed to be amended. In 1968, the Comité Maritime International (CMI)[2] finished work on the Visby Amendments to the Hague Rules. In 1979, the CMI modified the amendments with a Protocol to base the limitation amount on Special Drawing Rights (SDRs) of the International Monetary Fund.[3] The Hague Rules as amended by the 1968 Visby Amendments and the 1979 Protocol are generally referred to as the Hague/Visby Rules.

In 1978, the United Nations Commission on International Trade L (UNCITRAL) finished drafting a completely different set of rules, the Hambu Rules.[4] Uniformity suffered as a result.

In addition, several nations have amended their laws governing the carriage goods by sea to laws other than Hague/Visby or Hamburg. Over the years, vario courts of various countries have interpreted the Hague Rules and Hague/Visby Rules somewhat differently. As a result, the law governing the carriage of goods is now confused. The tables annexed to this testimony as an appendix list the nations that have adopted the Hague Rules 1924, the Hague/Visby Rules, and the Hamburg Rules as well as legislation similar to those rules. It also lists nations that have enacted different regimes. COGSA 98 has the possibility of starting the international uniformity restoration process. Our State Department has recommended to UNCITRAL that UNCITRAL draft a new treaty to govern both the carriage of goods by sea and the negotiability of bills of lading. Our State Department has further suggested that UNCITRAL not draft the treaty itself, but that it request non-governmental, international associations such as CMI to work on the initial draft and to submit it to UNCITRAL. Both UNCITRAL and CMI are agreeable to this suggestion. COGSA 98 may provide guidance for this project if it is enacted before the CMI draft is completed. As is explained later in the testimony, COGSA 98 eliminates the error of navigation or management defense. If the United States eliminates that defense, the CMI draft may eliminate it as well. If the United States does not act first, the CMI draft may retain the error of navigation or management defense and we may be presented with a convention the United States is not willing to ratify.

The MLA, various underwriters of cargo and ships, and numerous ocean carriers have, since 1968, urged ratification of the Hague/Visby Rules. On the other hand, certain cargo interests have, since 1978, urged ratification of the Hamburg Rules. As a result of this disagreement, neither the Hamburg Rules nor the Hague/Visby Rules have been ratified by this country, and the United States is out of step with our trading partners.

Our cargo shippers may not look to our courts to recover what their foreign competitors may recover in their own courts. Nations that comprise approximately 70% of the United States' trade have enacted the Hague/Visby Rules, while nations that comprise about 2% of the United States' trade have enacted the Hamburg Rules. COGSA 36 limits an ocean carrier's liability for cargo damage or loss to $500 per package or, for cargo not packaged, $500 per customary freight unit. COGSA 98 adopts the higher Hague/Visby limit. The Hague/Visby Rules limit the carrier's liability to 666.67 SDRs per package, or 2 SDRs per kilogram, whichever is higher. As of April 1, 1998, an SDR was valued at about $1.34. At this rate, the limit per package would be $893.34, and per kilo $2.68 ($1.22 per pound). In addition, the Hague/Visby Rules generally do not consider larger packages such as pallet loads or ocean containers as packages if they contain smaller packages. The smaller packages are generally the limitation packages, and are usually worth less than the $893.34 package limit. The Hamburg Rules use the same limitation system as the

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[1] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, reprinted in 6 Benedict on Admiralty doc. 1–1 (7th ed. 1993); enacted with certain minor changes as the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §§ 1300, et seq.

[2] An international association of national maritime law associations. CMI was founded in 1897 and has drafted many maritime treaties, including the Hague Rules.

[3] The Special Drawing Right (SDR) is a fictitious currency used by the International Monetary Fund to temper fluctuations amongst currencies. It is a mixture of United States dollars, British pounds sterling, Japanese yen, German marks and French francs. It's value in various currencies is reported daily. As of April 1, 1998, one SDR was valued at about $1.34.

[4] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, reprinted in 6 Benedict on Admiralty doc. 1–3 (7th ed. 1993).

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Hague/Visby Rules, but the Hamburg Rules' limitation amount is slightly higher than Hague/Visby's.

In 1988, the Department of Transportation held meetings of various parties in the United States interested in the carriage of goods by sea in an effort to reach a compromise between the Hague/Visby factions and the Hamburg factions. In 1992, the Subcommittee on the Merchant Marine of the Committee on Merchant Marine and Fisheries of the House of Representatives held Oversight Hearings for the same reasons. The parties still disagreed.

Approximately six years age, the Committee on the Carriage of Goods of the MLA appointed a working group comprised of persons interested in various aspects of the carriage of goods by sea. This working group was asked to attempt to reach a compromise. COGSA 98 is that compromise.

At the outset, those interests favoring the Hamburg Rules insisted that the error of navigation or management defense be eliminated. That defense would exonerate a carrier if cargo were lost or damaged as the result of an error in the navigation of a vessel or the management of a vessel at sea. The drafters of the Hague Rules reasoned in the 1920s that an error of navigation or management at sea was beyond the control of either the shipowner or the cargo owner. They decided not to assign liability for matters not under the control of either party to a contract for carriage of goods by sea. Thus, any damage to or loss of cargo caused by an error of navigation or management of a vessel at sea effectively would be suffered by cargo interests. Correspondingly, any damage to the vessel caused by an error of navigation or management would be suffered by the carrier. That defense, which is part of COGSA 36, has been criticized for many years and should now be eliminated. COGSA 98 eliminates it.

While the sectors of the maritime industry favoring the Hamburg Rules insisted on the elimination of the error of navigation and management defenses, the sectors of the maritime industry favoring the Hague/Visby Rules insisted on the retention of the catalogue of exemptions from liability (other than errors of navigation or management) contained in the Hague Rules, COGSA 36, and the Hague/Visby Rules. Carrier interests also insisted on a modification of the burden of proof rules and the ability to avoid issuing receipts for quantities of cargo described by shippers in bills of lading, but not checked by carriers.

These basic positions formed the foundation for the compromise. During the course of several years of discussions and drafts, various compromises were reached, improvements were made to COGSA 36, and the intent of the original drafters of the Hague Rules was restored where necessary. As a result, COGSA 98 represents a proposal which is not to the complete liking of any one sector of the maritime industry, but is acceptable, in whole, to all sectors of the ocean shipping industry.

The following paragraphs will describe some highlights of COGSA 98.

*1. COGSA will govern the entire multimodal carriage.*

COGSA 36 governs, by the force of law, the carriage of cargo by sea from the time it is loaded on board a ship until it is discharged from the ship. This aspect of the law does not address the needs of the modern, multimodal system of transportation. The new act will govern the entire period of carriage described in the through bill of lading. Thus if cargo is shipped from Rotterdam to Chicago, the new act will govern, as between the carriers and cargo interests, from the time the carrier or its trucker or other agent receives the cargo in Rotterdam, through the ocean voyage, discharge in the Port of New York, rail transportation to Chicago and truck transportation to the consignee's premises.

Although trucks and trains are exempted from the direct application of the act, the carrier issuing the through, multimodal bill of lading (probably the ocean carrier) will be liable to cargo interests for the entire period of carriage pursuant to the terms of COGSA 98. The parties and the courts will not have to litigate where damage might have occurred to determine the standard of liability or limitation. As between the carrier and the cargo interests, the standard of liability and the limitation of liability will remain the same throughout the cargo's journey.

In addition, all parties participating in the carriage, other than railroads and trucks, will be granted, as a matter of law, all the rights and duties of COGSA 98. The multimodal coverage of COGSA 98 will provide needed certainty to this modern method of cargo transportation.

*2. List of Hague/Visby defenses will remain identical to Hague/Visby for the sake of uniformity except for the error of navigation or management defense.*

The COGSA 36 duty to exercise due diligence to make the ship seaworthy at and before the commencement of the voyage and the specific list of COGSA 36 exceptions from liability, 46 U.S.C. App. §§ 1303, 1304, other than error of navigation or

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management, remain intact in COGSA 98. Thus, the case law that has developed over the last 62 years to interpret COGSA 36 will be available to interpret COGSA 98.

*3. The Burden of Proof Rules will be changed to allow apportionment of damage if more than one event combines to cause damage.*

At the present time, if two events combine to damage cargo and the carrier would only be liable for one of those two events, the carrier would generally have the burden to prove the precise amount of damage caused by the event for which it was not liable. This rule was established in *Schnell & Co.* v. *Vallescura*, 293 U.S. 296, 1934 A.M.C. 1573 (1934). That case concerned a shipment of onions, which was damaged due to a lack of ventilation during the voyage. The onions were not ventilated for part of the voyage because the seas were too rough to permit ventilation. The onions were not ventilated for other parts of the voyage because the crew failed properly to ventilate them. The Supreme Court placed the burden on the carrier to prove which onions were damaged because of a lack of ventilation during rough weather and which onions were damaged because the crew failed to ventilate them when the weather was not rough. The carrier could, of course, not meet this insuperable burden, and was ordered to pay 100% of the damages.

COGSA 98 would require the finder of fact to apportion the damage between the two causes. If the trier of fact could not determine an apportionment of damages, the trier of fact would have to split damages 50/50 and award a 50% recovery to cargo interests. Thus, if a bulk cargo of grain were damaged partly by a moist condition when it was delivered to the vessel and partly by water which entered through leaking hatch covers, the party who bore the burden of proof would not necessary have to bear 100% of the damage. Both parties would bear an equal burden, and the damage would be apportioned.

*4. Quantity of cargo described by the shipper in the bill of lading but not counted or measured by the carrier.*

Some courts in the United States have interpreted COGSA 36 to treat the quantity of carge described by a shipper in a bill of lading as prima facie evidence of the quantity of cargo received by the carrier. These courts grant this prima facie effect to the bill of lading quantity description even if the carrier does not check, and should not have checked, the quantity of cargo it received. It, in effect, holds a carrier liable for cargo that may have never been delivered to it by the shipper.

COGSA 98 will permit a carrier to avoid this prima facie effect of the quantity description for cargo it did not count and was not expected to count, by a plain warning on the face of the bill of lading such as "shipper's load, stow and count."

If a carrier is unable to measure precisely the amount of a liquid cargo it receives, it will not be bound to the precise quantity placed in a bill of lading by the shipper. The carrier will be able to issue the bill of lading with the quantity description needed by the shipper, but with a warning to prospective purchasers of the bill of lading in the form of a clause such as, "Shipper's Weight, Load, and Count." Similarly, container ship operators will be able to place the same warning on bills of lading by stating "Said to Contain" for sealed containers. Obviously, a container ship operator is not able to check the bill of lading quantity description against the cargo inside a sealed container.

*5. Increase of the limitation amount.*

This crucial change will bring the United States into unity with nations that have adopted the Hague/Visby Rules or a Hague/Visby system of liability. It will also reduce or eliminate needless and wasteful litigation over the question of what constitutes a COGSA 36 package. COGSA 36 limits a carrier's liability to $500 per package, or for goods not shipped in packages, per customary freight unit. The freight unit is the unit on which the freight, the charge for carrying the cargo, has been computed. COGSA 98 and Hague/Visby Rules increase that limitation to 666.67 SDRs per package ($893.34 as of April 1, 1998), or 2 SDRs per kilogram ($2.68 per kilo or $1.22 per pound as of April 1, 1998), whichever is higher. Contrary to COGSA 36, the COGSA 98 and the Hague/Visby Rules do not generally treat a pallet as a package and thus treat each carton loaded onto the pallet as the limitation package. This increase of limitation will allow cargo interests to obtain the same recovery in the courts of the United States which they are now forced to travel to foreign courts to obtain.

*6. Choice of Forum Clauses will be limited.*

COGSA 98 will overturn *Vimar Seguros y Reaseguros, S.A.* v. *M/V SKY REEFER*, 515 U.S. 528, 115 S.Ct. 2322, 1995 AMC 1817 (1995). *SKY REEFER* upheld a clause on the reverse side of a bill of lading that required all disputes to be submitted to

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arbitration in Tokyo. The purchaser of the bill of lading for oranges carried from Morocco to Boston was required by the court's interpretation of this clause to submit its dispute to Tokyo arbitrators rather than the United States District Court in Boston. COGSA 98 will not honor a provision calling for a forum outside the United States for cargo shipped to or from the United States. If the choice of forum clause calls for arbitration outside the United States for cargo shipped to or from the United States, any party may move a United States court to order arbitration at an appropriate location in the United States.

COGSA 98 represents the first crucial step toward modernization and uniformity of the law governing the carriage of goods by sea. It may very well form a model for other nations to follow. We urgo its enactment into the law of the United States. The MLA would be pleased to render any assistance the Subcommittee may request. Thank you for your consideration.

APPENDIX A.—GEORGE F. CHANDLER, III, DAMAGES TO CARGO: THE MEASURE OF DAMAGES TO CARGO—REDUX, 72 TULANE LAW REVIEW, 539, 565–569 TABLE 1 (1997)

Table 1.—A Survey of the Cargo by Sea Conventions as They Apply to Certain States

| Country | Hague | Visby | Hamburg | Limit |
|---|---|---|---|---|
| Algeria | 4–13–1964 | | | |
| Angola | 2–2–1952 | | | |
| Antigua/Barb | 12–2–1930 | | | |
| Argentina | 4–19–1961 | In Part | | £100 gold [1] |
| Aruba | Comm Code | | | |
| Australia | 7–4–1955a | 7–16–1993 mod 9–15–1997 [2]e. | | 667/2 SDR |
| Austria | | | 7–29–1993 | LL 835/2.5 SDR |
| Bahamas | 12–2–1930 | | | |
| Barbados [3] | 12–2–1930 | | 2–2–1981 | 835/2.5 SDR |
| Belgium | 6–2–1930 | 9–7–1978b | | 667/2 SDR |
| Belize | 12–2–1930 | | | |
| Bermuda | 12–2–1930d | 11–1–1980 | | 667/2 SDR |
| Bolivia | 5–28–1982 | | | LL |
| Bonaire | Comm Code | | | |
| Botswana [4] | | | 2–16–1988 | LL 835/2.5 SDR |
| Brazil | Comm Code | | Signed Only | per B/L |
| Burkina Faso | | | 8–14–1989 | LL 835/2.5 SDR |
| Camerdon [5] | 12–2–1930 | Signed Only | 10–21–1993 | 835/2.5 SDR |
| Canada | revoked | Comm Code | Conditional | 667/2 SDR |
| Cape Verde | 2–2–1952 | | | |
| Cayman Isl | 12–2–1930d | 10–20–1983 | | 667/2 SDR |
| Chile | Signed Only | | 7–9–1982 | 835/2.5 SDR |
| China [6]e | | In Part | In Part | 667/2 SDR |
| Colombia | In Part | | | None |
| Croatia | 10–8–1991 | Comm Code | | 667/2 SDR |
| Cuba | 7–25–1977 | | | $100 Cuban |
| Cyprus | 12–2–1930 | | Signed Only | |
| Czech Rep | | | 6–23–95 | LL 835/2.5 SDR |
| Denmark | 7–1–1938d | 11–20–1975 [7]a | Signed Only | 667/2 SDR |
| Dominica | 12–2–1930 | | | |
| Dom Republic | | | | not allowed |
| Ecuador | 3–23–1977 | 3–23–1977 | Signed Only | 10,000/30 pgf |
| Egypt | 11–29–1943d | 1–31–1983 [8] | 4–23–1979 | 667/2 SDR |
| Fiji | 12–2–1930 | | | $236-Fiji |
| Finland | 7–1–1939 | 12–1–1984 [9]a | Signed Only | 667/2 SDR |
| France | 1–4–1937 | 12–10–1977 | Conditional | 667/2 SDR |
| Gambia | 12–2–1930 | | 2–7–96 | 835/2.5 SDR |
| Georgia | | 2–20–1996 | 3–21–96 | 835/2.5 SDR |
| Germany [10] | 7–1–1939 | Internally | Signed Only | DM1250/pkg |
| Ghana | 12–2–1930 | | Signed Only | |
| Gibraltar | 12–2–1930d | 12–22–1977 | | 667/2 SDR |
| Greece | 3–23–1993 | 3–23–1993 | | 667/2 SDR |
| Grenada | 12–2–1930 | | | |
| Guinea [11] | 2–2–1952 | | 1–23–1991 | 835/2.5 SDR |
| Guyana | 12–2–1930 | | | |

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Table 1.—A Survey of the Cargo by Sea Conventions as They Apply to Certain States—Continued

| Country | Hague | Visby | Hamburg | Limit |
|---|---|---|---|---|
| Holy See | | Signed Only | Signed Only (Vatican). | |
| Hong Kong | 12–2–1930d | 11–1–1980 | | 667/2 SDR |
| Hungary[12] | 6–2–1930 | | 7–5–1984 | LL 835/2.5 SDR |
| Iceland | | Comm Code | | 667/2 SDR |
| India | Revised | Comm Code | | 667/2 SDR |
| Indonesia | | Comm Code | | Dfl/Idr 600 |
| Iran | 4–26–1966 | | | |
| Ireland | 1–30–1962 | 2–6–1997 | | Irish £100 |
| Israel | 11–5–1959 | Comm Code | | 667/2 SDR |
| Italy | 10–7–1938d | 7–22–1985 | Conditional | 667/2 SDR |
| Ivory Coast | 12–15–1961 | | | |
| Jamaica | 12–2–1930 | | | |
| Japan | 12–1–1957d | 3–1–1993e | | 667/2 SDR |
| Kenya[13] | 12–2–1930 | | 7–31–1989 | 835/2.5 SDR |
| Kiribati | 12–2–1930 | | | |
| Korea (S) | Revoked | Comm Code | | 500 SDR/pkg |
| Kuwait | 7–25–1969 | | | |
| Lebanon[14] | 7–19–1975 | 4–26–1982 | 4–4–1983 | 835/2.5 SDR |
| Lesotho[15] | | | 10–26–1989 | 835/2.5 SDR |
| Liberia | Revoked | Comm Code | | 667/2 SDR |
| Macao | 2–2–1952 | | | |
| Madagascar | 7–13–1965 (as Malg Rep). | | Signed Only | |
| Malaysia | 12–2–1930 | | | £100 gold |
| Malawi[16] | | | 3–18–1991 | LL 835/2.5 SDR |
| Mauritania | | Signed Only | | |
| Mauritius | 8–24–1970 | | | |
| Mexico | Revoked | 5–20–1994 | Signed Only | 667/2 SDR[17] |
| Monaco | 5–15–1931 | | | |
| Montserrat | 12–2–1930 | 10–20–1983 | | 667/2 SDR |
| Morocco | | | 6–12–1981 | 835/2.5 SDR |
| Mozambique | 2–2–1952 | | | |
| Nauru | 7–4–1955 | | | |
| Netherlands | 8–18–1956 | 4–26–1982 | | 667/2 SDR |
| New Zealand | Revoked | 12–20–1994a | | 667/2 SDR |
| Nigeria[18] | 12–2–1930 | | 11–7–1988 | 835/2.5 SDR |
| Norway | 7–1–1938d | 3–19–1974[19]a | Signed Only | 667/2 SDR |
| Oman | | Comm Code | | 667/2 SDR |
| Pakistan | Comm Code | | Signed Only | |
| Panama | Comm Code | | Signed Only | per B/L |
| Papua New G. | 7–4–1955 | | | |
| Paraguay | 11–22–1967 | Signed Only | | LL |
| Peru | 10–29–1964 | | | £100 gold[20] |
| Phillipines | US COGSAb | Signed Only | Signed Only | $500 |
| Poland | 8–4–1937 | 2–12–1980 | | 667/2 SDR |
| Portugal | 12–24–1931 | | Signed Only | 100,000 Escud |
| Romania[21] | 8–4–1937 | | 1–7–1982 | 835/2.5 SDR |
| Sao Tome | 2–2–1952 | | | |
| Senegal | 2–14–1978 | | 3–17–1986 | 835/2.5 SDR |
| Seychelles | 12–2–1930 | | | |
| Sierra Leone[22] | 12–2–1930 | | 10–7–1988 | 835/2.5 SDR |
| Singapore | 12–2–1930 | 4–25–1972 | Signed Only | 1563.65/4.69 |
| Slovakia | | | Signed Only | |
| Slovenia | 6/25/91 | | | $4. |
| Solomon Isl. | 12–2–1930 | | | |
| Somalia | 12–2–1930 | | | |
| South Africa | Revoked | Comm Code | a | 10,000/30 pgf |
| Spain | 6–2–1930 | 1–6–1982 | | 667/2 SDR |
| Sri Lanka | 12–2–1930 | 10–21–1981 | | 10,000/30 pgf |
| St Kitts-Nevis | 12–2–1930 | | | |
| St Lucia | 12–2–1930 | | | |
| N.Antilles | Comm Code | | | |

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## Table 1.—A Survey of the Cargo by Sea Conventions as They Apply to Certain States—Continued

| Country | Hague | Visby | Hamburg | Limit |
|---|---|---|---|---|
| St Vin/Gren. | 12–2–1930 | | | |
| Sweden | 7–1–1938d | 12–9–1974 [23]a | Signed Only | 667/2 SDR |
| Switzerland | 5–28–1954 | 12–11–1975 | | LL 667/2 SDR |
| Syria | 8–1–1974 | 8–1–1974a | | 10,000/30 pgf |
| Taiwan | US COGSAb | | | TWD 9000/pkg |
| Tanzania [24] | 12–3–1962 | | 7–27–1979 | 834/2.5 SDR |
| Thailand | | Comm Code | e | THB10,000/30 |
| Tonga | 12–2–1930 | 6–13–1978 | | 10,000/30 pgf |
| Trinidad/Tob. | 12–2–1930 | | | |
| Tunisia | | | 11–15–1980 | 835/2.4 SDR |
| Turks/Caicos | 12–2–1930 | 10–20–1983 | | 667/2 SDR |
| Turkey | 7–4–1955 | | | $ 100 Sterling |
| Tuvalu | 12–2–1930 | | | |
| Uganda | | | 7–6–1979 | 835/2.5 SDR |
| United King. | 7–2–1930d | 10–1–1976 | | 667/2 SDR |
| UK Virgin Isl | 12–2–1930d | 10–20–1983 | | 667/2 SDR |
| United States | 7–29–1937b | | Signed Only | $500/pkg |
| Uruguay | | Signed Only | | None [25] |
| USSR/CIS | Comm Code | | | |
| Venezuela | | | Signed Only | per B/L |
| Vietnam | | Comm Code | | 10,000/30 gf |
| Yugoslavia | 4–17–1959 | Comm Code | | 667/2 SDR |
| Zaire (Congo) | 7–17–1967 | | Signed Only | |
| Zambia [26] | | | 10–7–1991 | 835/2.5 SDR |
| 134 States | 58 (2LL) | 44(1LL) | 25 (9LL) | [7 no convention] |

Abbreviations: a = Restricts/bans forum/arbitration clauses; b = Covers imports; c = Covers receipt to delivery; d = Denounced; e = Covers receipt to delivery and imports; LL = Landlocked; SDR = Special Drawing Right; pgf = Poincarre Gold Franc; pkg = Package; B/L = Bill of Lading; Conditional = In the Commercial Code, but awaiting future events. Comm Code = Not a party to the Convention, but has it in its Code. Signed Only = Signatory to the Convention only.

[1] The value of gold would be based on current values of gold (about $9,000.00).

[2] Australian COGSA has been amended as part of a compromise to forestall the imposition of the Hamburg Rules in Australia. Specific provisions for the amended act are to be worked out at a later date.

[3] Has not renounced the Hague Rules as required by Article 31 of the Hamburg Rules thereby creating a conflict between conventions.

[4] Has not incorporated Hamburg into its code such that it is in doubt if its courts will apply Hamburg.

[5] See note 3, also has not incorporated Hamburg into its national code such that Hamburg would not be applied by its courts.

[6] China has devised its own rules using some features of H/V and Hamburg.

[7] For domestic trade and trade between Denmark, Finland, Norway and Sweden, each country has added the Hamburg Rules to its code, but retained H/V's limitation, one year time for suit, and defense of navigation or management error.

[8] Has invoked Article 31(4) of Hamburg to defer denunciation of H/V for five years until Nov. 1, 1997, such that Hamburg will only apply to voyages between contracting states through Nov. 1, 1998.

[9] See note 7.

[10] Germany has incorporatnd H/V into its code for domestic use and for shipments to H/V countries only. Other international shipments are under the Hague Rules (At DM1250/pkg.). The ratification of H/V by the former GDR, expired when the GDR was absorbed into Germany.

[11] See note 3.

[12] Has not incorporated Hamburg into its code such that Hamburg would not be applied by its courts.

[13] See note 4.

[14] Has not renounced the Hague or H/V Rules as required by Article 31 of the Hamburg Rules thereby creating a conflict between conventions.

[15] See note 12.

[16] See note 12.

[17] Mexico has incorporated the UN Multimodal Convention into its code, such that multimodal bills of lading would be subject to the Multimodal Limitation of 920 SDRs per package or 2.75 SDRs per kilogram.

[18] See note 5.

[19] See note 5.

[20] See note 1.

[21] See note 3.

[22] See note 3.

[23] See note 7.

[24] See note 3.

[25] If foreign law is applicable, the current value of gold would be used. Under the Hague Rules, that would be about US$9,000. Under H/V, it would be about US$7,000.

[26] See note 12.

## Appendix B.—Table of Nations Governed by The Hague Rules of 1924 or Similar Legislation

### Table B.—Nations Covered by the Hague Rules of 1924 or Similar Legislation

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Algeria | .19 |

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Table B.—Nations Covered by the Hague Rules of 1924 or Similar Legislation—Continued

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Angola | .21 |
| Antigua/Barb | .0064 |
| Aruba | ..... |
| Bahamas | .063 |
| Belize | .012 |
| Bolivia | .038 |
| Brazil ..... | 1.51 |
| Cape Verde | .0 ** |
| Cuba ..... | .0 |
| Cyprus | .019 |
| Dominica | ..... |
| Fiji | .0073 |
| Ghana | .0033 |
| Grenada | .0028 |
| Guyana | .017 |
| Iran | .0 |
| Ivory Coast | .038 |
| Jamaica | .16 |
| Kiribati | .00035 |
| Kuwait | .26 |
| Macao | .063 |
| Madagascar | .0041 |
| Malaysia | 1.86 |
| Mauritius ..... | .017 |
| Monaco ..... | .0013 |
| Mozambique | .0035 |
| Nauru | .0 |
| N. Antilles | .093 |
| Pakistan | .18 |
| Panama | .12 |
| Papua New G. | .011 |
| Paraguay | .066 |
| Peru | .21 |
| Phillippines | 1.01 |
| Portugal | .14 |
| Sao Tome | 0 |
| Sarawak | 0 |
| Seychelles ..... | 0 |
| Slovenia ..... | 0 |
| Solomon Isl. | 0 |
| Somalia | 0.00028 |
| St. Kitts-Nevis | 0 |
| St. Lucia | 0 |
| St. Vin/Gren. | 0 |
| Taiwan | 1.31 |
| Timor | 0 |
| Trinidad/Tob. | .12 |
| Turkey | .33 |
| Tuvalu | 0 |
| United States | N/A |
| USSR (CIS) *** | .69 |
| Zaire | .023 |
| Total Percentage ..... | 8.78933 |

** 0 represents $500,000 or less in trade.
*** We have assumed that all the former members of the Soviet Union have not changed their cargo laws domestically.

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## APPENDIX C.—TABLE OF NATIONS GOVERNED BY THE HAGUE-VISBY RULES AND OTHER SIMILAR LEGISLATION

### Table C.—Nations Governed by The Hague-Visby Rules and Other Similar Legislation

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Australia | 1.12 |
| Belgium | 1.37 |
| Bermuda | .021 |
| Canada | 20.53 |
| Cayman Isl. | .016 |
| Croatia | .013 |
| Ecuador | .23 |
| France | 2.34 |
| Germany | 4.42 |
| Gibraltar | .0013 |
| Greece | .093 |
| Hong Kong | 1.69 |
| Iceland | .035 |
| India | .67 |
| Indonesia | .86 |
| Ireland | .60 |
| Israel | .88 |
| Italy | 1.91 |
| Japan | 12.93 |
| Korea(S) | 3.49 |
| Liberia | .0054 |
| Mexico | 9.18 |
| Montserrat | 0 |
| Netherlands | 1.64 |
| New Zealand | .23 |
| Oman | .044 |
| Poland | .11 |
| Singapore | 2.62 |
| South Africa | .38 |
| Spain | .69 |
| Sri Lanka | .11 |
| Switzerland | 1.14 |
| Syria | .017 |
| Thailand | 1.31 |
| Tonga | 0 |
| Turks/Caicos | .0034 |
| United King. | 4.23 |
| UK Virgin Isl. | .0043 |
| Vietnam | .066 |
| Yugoslavia | .0038 |
| Total Percentage | 75.0032 |

## APPENDIX D.—TABLE OF NATIONS GOVERNED BY THE HAMBURG RULES

### Table D.—Nations Governed by the Hamburg Rules

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Austria | .030 |
| Barbados | .019 |
| Botswana | .0040 |
| Burkina Faso | .00099 |
| Cameroon | .0096 |
| Chile | .45 |
| Czech Rep. | .063 |
| Egypt | .27 |
| Gambia | .00077 |
| Georgia | .0064 |

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Table D.—Nations Governed by the Hamburg Rules—Continued

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Guinea | .014 |
| Hungary | .071 |
| Kenya | .015 |
| Lebanon | .047 |
| Lesotho | .0048 |
| Malawi | .0061 |
| Morocco | .051 |
| Nigeria | .47 |
| Romania | .036 |
| Senegal | .0044 |
| Sierra Leone | 0 |
| Tanzania | .0049 |
| Tunisia | .019 |
| Ugahda | .0023 |
| Zambia | .0078 |
| Total Percentage | 1.60706 |

## Appendix E.—Table of Nations Governed by Other Rules[1]

Table E.—Nations Covered by Other Rules

| Nation | Percentage (%) of U.S. Trade |
|---|---|
| Argentina | .48 |
| Bonaire | No Information |
| China | 4.49 |
| Colombia | 0.64 |
| Denmark | .27 |
| Dom. Republic | .48 |
| Finland | .34 |
| Holy See | No Information |
| Mauritania | .0014 |
| Norway | .38 |
| Sabah | No Information |
| Slovakia | 0 |
| Sweden | .75 |
| Uruguay | .52 |
| Venezuela | 1.26 |
| Zambia | .0078 |
| Total Percentage | 9.6192 |

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## Prepared Statement of James F. Moseley, President, The Maritime Law Association of the United States

I am providing this written statement in my capacity as President of The Maritime Law Association of the United States to express on behalf of the Association our great interest in the Carriage of Goods by Sea Act of 1998. In so doing, I will briefly set forth the organization, activities and purposes of this Association, as well as, our deep involvement in the fostering of maritime law, its administration, the

[1]The nations set forth in Tables B, C, D, and E, were obtained from the list of nations in George F. Chandler, III, *Damages to Cargo: The Measure of Damages to Cargo-Redux*, 72 Tul. L.Rev. 539, 565–569 table 1 (1997). The percentages of trade were obtained from the U.S. Bureau of the Census, *Statistical Abstract of the United States: 1997* (117th ed. ) Washington D.C. 1997.



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law on international transportation by water, and circumstances surrounding the proposal of the Carriage of Goods by Sea Act 1998.

I regret that I cannot attend the hearing in person, but my Association has a long standing commitment to attend the meetings, as a pro bono advisor to the United States Government delegation, of the International Maritime Organization. I am attending the IMO Legal Committee Conference this week together with the Second Vice President of the Association, Mr. William R. Dorsey, III.

Mr. Chester D. Hooper the Immediate Past President will deliver the remarks for the Association. In attendance also is Mr. Howard M. McCormack, the incoming President, together with others of the Association.

## I. ORGANIZATION

The Maritime Law Association of the United States was founded in 1899. Its membership consists of persons residing in all coastal states and has a membership of approximately three thousand, seven hundred maritime lawyers, maritime industry executives, academics and representatives of all segments of the industry. This includes shippers, ship owners, insurance, ship building and other related maritime enterprises and lawyers for those interests.

The Association, soon to celebrate its centennial next year, has been, since its inception, devoted to international commercial matters including the Carriage of Goods by Sea.

Further, since its inception it has been an entirely volunteer organization with no staff. For years it has been called on by numerous governmental agencies, both state and federal, to provide expertise. It continues this voluntary service to courts by the filing of selective amicus curiae briefs in the United States Supreme Court and the United States Courts of Appeals.

## II. ACTIVITIES

### *A. National activities*

In coordinating with numerous government agencies, The Maritime Law Association of the United States has been the recipient of numerous compliments from agencies and the courts, including the Supreme Court of the United States. The latter having termed the MLA "an organization of experts in admiralty law."[1] In furtherance of the MLA purposes, it has been a significant proponent of wide-ranging legislation dealing with maritime matters during its 99 years of existence. These include, but are not limited to: the Carriage of Goods by Sea Act of 1936,[2] the Federal Arbitration Act,[3] and the Foreign Sovereign Immunities Act.[4] Further, it has been a significant source of resource information in the formulation of other maritime laws.[5]

In its pro bono work on the above cited matters and many others too numerous to mention, the Association has squarely met its objectives as stated in the Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

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[1] *Offshore Logistics* v. *Tallentire*, 447 U.S. 210, 223 (1986).

[2] 46 U.S.C. §§ 1300–1315.

[3] 39 U.S.C. §§ 1–5.

[4] 28 U.S.C. §§ 1330, 1602–1611

[5] E.g. Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251–1376; Convention on the International Regulations for Preventing Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, reprinted in 6 Benedict on Admiralty, Doc. No. 3–4 (Frank L. Wiswall, Jr. Ed., 7th ed-Rev. 1996); see 33 C.F.R. Ch. 1 Subch. D, Special Note, at 176 (1995); United States Inland Navigation Rules; 33 U.S.C. §§ 2001–2073.

Merchant Marine Vessel and Safety Personnel, Hearings on HR 2247 before the Subcommittee on Coast Guard and Navigation and Merchant Marine, Committee on Merchant Marine and Fisheries, 98th Cong., 1st Sess., 521–527 (1983) (statement of the President of the Maritime Law Association); Merchant Marine Vessel Safety and Personnel Hearings on HR 7103 before Subcommittee on Coast Guard and Navigation and Merchant Marine, Committee on Merchant Marine and Fisheries, 97th Cong., 2d. Sess. (September 23, 1982) (statement of the President of the Maritime Law Association).

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In addition to substantive matters of law, the Association is involved with aspects of procedural law and sharing its expertise.[6]

*B. International*

In international matters, The Maritime Law Association of the United States works closely with the Comité Maritime International (CMI) and with the International Maritime Organization (IMO) that was established by the United Nations. IMO is located in London with its primary objectives being the improvement of maritime safety and prevention of pollution. Frequently, in fact at nearly every meeting of the IMO Legal Committee, the MLA is called on to furnish advisers to the US Delegation to the IMO.

In recent years, the MLA has participated in several projects of a maritime law nature undertaken by agencies of the United Nations including its commission on Trade Law (UNCITRAL) and Trade and Development (UNCTAD). Thus, it has the international perspective from participation in international organizations to supplement its broad-based bipartisan perspective on the national scene.

III. CARRIAGE OF GOODS BY SEA ACT OF 1998

In full recognition that the Carriage of Goods by Sea Act 1936 was created in a different era, a need was seen by The Maritime Law Association of the United States to create from members of its standing Committee of Carriage of Goods, a Steering Committee composed of all points of view to revisit this Act. Ocean transportation had changed from break bulk cargo to containers. Moreover, technical changes had occurred in bulk shipments and other types of specialized cargo. Technology also had impacted the methodology of bills of lading and other commercial paper. Moreover, court rulings in certain monetary and limitation aspects had greatly and somewhat confusingly changed the landscape of maritime transportation in legal areas. It was apparent that the sixty year old legislation should be reviewed and its effectiveness considered in the current era.

The Steering Committee began its efforts. During this time, comments were received from all over the country. A half dozen meetings were held throughout the nation to get points of view from all regions. The end result was that in May, 1996 an overwhelming vote of the Association approved the Committee's work. This proposal grew into a universal acceptance by all points of view among those organizations of our nation involved in international shipping. These diverse groups that have shared their expertise with The Maritime Law Association of the United States now favorably support this Carriage of Goods by Sea Act 1998.

IV. CONCLUSION

The Association trusts that you and your Subcommittee will favorably consider this significant Senate Bill. In 1936, the Senate enacted a landmark statute that has served our nation well for nearly two-thirds of a century. We respectfully submit that now is the propitious time to lead the American ocean transportation industry into the twenty-first century by a favorable vote on this Bill. The initiative will be the vanguard for other nations with shipping interests.

Senator HUTCHISON. Thank you.

Mr. William Augello, the National Industrial Transportation League.

## STATEMENT OF WILLIAM J. AUGELLO, ESQ., NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Mr. AUGELLO. Thank you, Madam Chairman. I am testifying as a member of the Ocean Transportation Committee of the National Industrial Transportation League.

I personally have been working on this legislation, or negotiating for it, for the past 20 years. The most unreasonable feature of the Carriage of Goods by Sea Act, which was enacted in 1936, has been

[6]The Maritime Law Association of the United States has drafted and developed Model Local Admiralty Rules, some of which have already been adopted by United States District Courts and many other District Courts have them under study today. It is hoped that this Model will eliminate disparities in the admiralty practice. This is current work in progress.

Further, the MLA has coordinated with the Judicial Conference of the U.S. to present admiralty law programs.

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the negligent navigation defense. Just consider that, if the Titanic had been a cargo ship, it would have had a defense to the loss of all the cargo on that ship because of its negligent navigation. We have been fighting to have that defense repealed. We have finally succeeded. But only as a part of a compromise package.

There are many features of this legislation which would favor cargo interests, but also many which would favor the ship-owning interests, as well. It is a balanced compromise.

The second important provision of this legislation would be to increase the $500 per package limitation to approximately $892 per package, based upon the Special Drawing Rights which fluctuate from day to day. And so, as of April 8, 1998, it would result in a package limitation of $892. However, there is a second feature of the limitation which is very favorable to cargo interests. That is it gives us an option of assessing a claim for a loss based upon the weight of the cargo lost. The weight would be based on two SDR's, or the equivalent of about $1.22 per pound. That is an option that we do not have today. And it should favor packaged freight, weighing more than 739 pounds per unit.

Another benefit is that it defines what a "package" is. Previously, a lot of litigation has developed over whether a 40-foot container is the package or whether a pallet-load of goods is one package. And there have been decisions, many decisions, where a shipper would only recover $500 for an entire unit, or an entire package, an entire pallet. This legislation would put an end to that type of litigation.

It will continue to give claimants a defense against the limitation if it can prove that the loss was caused by an unreasonable deviation, such as for the purpose of loading or unloading cargo or passengers.

I think perhaps the most important feature of this legislation would be to permit U.S. cargo owners to arbitrate or litigate in the United States instead of in a foreign jurisdiction. The specific purpose of this legislation is to override the Supreme Court's decision, which came down a year or two ago, which upheld the validity of foreign arbitration clauses in foreign bills of lading. Therefore, this is an essential element of this legislation.

"On-deck" cargo will now be covered by COGSA under this legislation. And carriers will not be able to recover from cargo owners under a general average claim if the carrier's negligent navigation of mismanagement of the ship caused the loss. That is also a very good benefit for cargo owners.

Cargo will now be covered for the entire period it is in the carrier's possession and control, rather than only from "tackle to tackle," which the present COGSA provides.

And the liability limitations will not apply if it is proved that the loss or damage resulted from an act or omission of the carrier done with intent to cause such loss or where the carrier acts recklessly and with knowledge that such loss would probably result.

The League continues to work with other interested groups on refining the proposal. It believes that the compromise represents a balanced plan, which will lead to global uniformity in the treatment of ocean carrier liability.

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These revisions should result in lower cargo insurance premiums for shippers and more reasonable claim settlements, thus avoiding lengthy, expensive litigation, particularly in foreign jurisdictions. These reforms would also facilitate the containerization revolution, and through intermodal transactions, developments that were not contemplated in 1936 when COGSA was enacted.

Thank you, Madam Chairman. We would be very happy to answer any further questions you may have.

[The prepared statement of Mr. Augello follows:]

PREPARED STATEMENT OF WILLIAM J. AUGELLO, ESQ., NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

My name is William J. Augello and I am testifying today on behalf of The National Industrial Transportation League ("League") on the subject of potential reform of the Carriage of Goods By Sea Act. I am a member of the League's Ocean Transportation Committee. The League supports enactment of the revisions to the Carriage of Goods by Sea Act as proposed by the Maritime Law Association.[1]

IDENTITY OF THE LEAGUE

Founded in 1907, The National Industrial Transportation League is a voluntary organization of over 1,000 shippers and groups and associations of shippers that conduct industrial and/or commercial enterprises of all sizes throughout the United States. The League is the oldest and the largest nationwide organization representing shippers that move all kinds of commodities, using all modes of carriage, across interstate, intrastate, and international boundaries. A significant number of League members are users of ocean transportation services. Accordingly, the League maintains a direct and substantial interest in the proposed revisions to the Carriage of Goods By Sea Act.

BACKGROUND OF THE LAWS GOVERNING OCEAN CARRIER LIABILITY

The liability of ship owners for loss of and damage to cargo on the high seas dates back to the days of wooden sailing vessels. In the United States, the statutory scheme that governs cargo loss and damage on the high seas is the Carriage of Goods By Sea Act, which is often referred to as "COGSA." COGSA was adopted by Congress in 1936 and was modeled after the 1924 International Convention known as the Hague Rules. With respect to allocating the responsibility for losses to cargo that occur at sea, COGSA was intended to provide for a system of shared risks between the cargo owner and the ship owner. The cornerstone of the 1936 COGSA was the establishment of a liability limit for ocean carriers of $500 per package or, when not in packages, per "customary freight unit." This liability limit has never been adjusted for inflation and thus has remained in effect for more than six decades. Not surprisingly, today a $500 package limitation is grossly inadequate to compensate shippers for cargo that is lost or damaged at sea.

In addition, COGSA exonerates a ship owner from liability for cargo losses if the ship owner proves that the loss was caused by the negligent navigation or mismanagement of the ship. To illustrate how this unconscionable defense has been applied by ocean carriers in the past to avoid liability, a summary of court decisions is annexed as Appendix A. The "nautical fault" defense, as it is often referred to, may have been justified in the early stages of shipping on the high seas when ship owners had no means of communicating with or maintaining control over their captains or crew for long periods of time. However, in modern times, this defense serves no valid purpose given the development of electronic communication systems, improved navigation devices and advances in marine technology. Simply stated, there can be no justification for allowing ocean carrier's to raise negligence as a defense to a claim for damages in ocean cargo movements today.

For years, both cargo interests and ship owners have recognized that COGSA fails to reflect modern shipping practices, such as containerization and through multimodal shipping. However, these groups have disagreed on the reforms that should

[1] The Maritime Law Association is an organization comprised of over 3600 members, including maritime practitioners, judges, law professors, and non-lawyers who hold responsible positions in the maritime field. The stated purpose of the Association is "to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, and to promote uniformity in its enactment and interpretation," among other related objectives.

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be adopted by Congress to improve the United States' statutory scheme for addressing cargo loss and damage on the high seas.

In 1978, the United Nations held a Convention on the Carriage of Goods by Sea to modernize ocean carriage liability laws. At this Convention, cargo owners worldwide supported the repeal of the "nautical fault" defense and an increase in ship owners' liability. As a result of that Convention, the Hamburg Rules were drafted. One of the principal changes made by the Hamburg Rules was to repeal the nautical fault defense.

In addition, the Hamburg Rules more than doubled the ship owners' limitation of liability under COGSA. The Hamburg Rules did not come into force as an international treaty until November 1, 1992, after being ratified by 20 nations. However, because ship owners and insurers opposed adoption of the Hamburg Rules, no significant trading nation adopted these Rules. However, in the past, the League has supported adoption of the Hamburg Rules by the United States.

Carrier interests, on the other hand, have generally encouraged the United States to adopt the 1979 Hague-Visby Rules ("Hague-Visby"). Under Hague-Visby, the liability of an ocean carrier would be raised to 666.67 Special Drawing Rights ("SDR's") per package, or 2 SDR's per kilogram. An SDR is a fictitious currency based upon the weighted average of the currencies of the United States, Britain, Japan, Germany and France. The value of this unit of account fluctuates daily. As of April 8, 1998, one SDR was valued at $1.337490. To illustrate the degree of fluctuation, on April 18, 1995, one SDR was valued at $1.59342.

Approximately 70% of the world's ocean trade moves under the Hague-Visby Amendments, whereas only 2% operate under the Hamburg Rules. The United States has not adopted either due to the opposing interests' inability to reach a consensus. As a result, U.S. cargo owners have been limited to the recovery of only $500 per package under the application of COGSA while their foreign competitors are able to recover up to 667 SDR's per package on cargo losses, approximately $892 per package on April 8, 1998. Furthermore, our foreign competitors also have the option of claiming compensation at 2 SDR's per kilogram, or $1.22 per pound, whichever is greater.

## THE MLA COMPROMISE

In 1992, an ad hoc committee of interested parties was formed by the MLA in an effort to seek a commercial compromise on reforming COGSA. I was personally involved in the negotiation of the compromise on behalf of cargo interests. Progress was made when ship owning interests agreed to the repeal of the nautical fault defense, which was of critical interest to shippers. Cargo owners then agreed to accept the Hague-Visby liability limits in lieu of the higher Hamburg Rules limit of 835 SDR's per package, or 2.5 SDR's per kilogram. Other legal and procedural issues were negotiated to the satisfaction of most interests.

It was not until 1995, when the U.S. Supreme Court upheld the validity of foreign arbitration clauses in foreign bills of ladings in the decision of *Seguros y Reaseguros S.A.* v. *M/V Sky Reefer, et al.*, 115 S.Ct. 2322, 1995 AMC 1817 (1995) ("Sky Reefer"), that U.S. cargo insurers joined cargo owners to support the MLA compromise. Their support was conditioned, however, on the legislation's overturn of *Sky Reefer*.

On May 3, 1996, by an overwhelming vote of 278–33, the MLA's membership voted to approve the MLA Committee's compromise. This compromise was approved later that year by the League's Ocean Transportation Committee and in early 1997 by the League's Board of Directors.

Under the MLA's proposal, cargo owning interests will benefit in several material respects:

1. Ocean carriers will no longer be able to avoid liability for cargo losses caused by the carrier's negligent navigation or mismanagement of the ship. However, the burden of proving such negligence has been shifted to the claimant raising that allegation. Maritime attorneys representing cargo interests do not believe that this burden will be insurmountable.

2. The liability limitation of $500 per package will be almost doubled to 677.66 SDR's per package, which equated to $892 on April 8, 1998.

3. An alternative basis for recovery has been added for claimants. When a package weighs 937 pounds or more, the carrier's liability limit is 2 SDR's per kilogram, or $1.22 per pound, based on the value of one SDR on April 8, 1998.

4. The term "package" is defined as the units of packaging used for the cargo as described on the bill of lading. This should end attempts by carriers and insurers to treat an entire steamship container or pallet load as the "package", and thus limit their liability to only $500 for the entire shipment.

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5. The new package limitation will apply to all individual packages, even when they are palletized or unitized, if the total number of packages is shown on the bill of lading.

6. The former practice of limiting the $500 limit to the "customary freight unit", such as when the rate is based on an entire vehicle, locomotive, or other large product, has been eliminated. Thus, claimants on unpackaged units will be able to base their claims on 2 SDR's per kilogram.

7. Claimants will be able to recover the full value of their cargo when they can prove that the loss was caused by the carrier's "unreasonable deviation," such as a deviation for the purpose of loading or unloading cargo or passengers.

8. Claimants on cargo moving to or from U.S. ports have the right to select a forum in the United States rather than be bound by a foreign forum clause in a bill of lading.

9. "On deck" cargo will now be covered by COGSA. Formally, cargo owners had the burden of proving the carrier's negligence and lack of due care in loading cargo on deck.

10. Carriers may not be able to recover from cargo-owners under a "general average" claim if the carrier's negligent navigation or mismanagement of the ship caused the loss.

11. Cargo will now be covered for the entire period it is in the carrier's possession and control, rather than only "from tackle to tackle". This will allow coverage from "door-to-door" on through intermodal movements if specified on the bill of lading.

12. The liability limitations will not apply if it is proved that the loss or damage resulted from an act or omission of the carrier, done with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

13. Electronic communications and bills of lading are provided for.

14. Carriers are prohibited from discriminating between competing shippers.

In conclusion, the League urges the Congress to enact these important revisions to COGSA. In the League's view, they represent a balanced compromise that will lead to global uniformity in the treatment of ocean carrier cargo liability. These revisions should result in lower cargo insurance premiums for shippers and more reasonable claim settlements, thus avoiding lengthy, expensive litigation, particularly in foreign jurisdictions. These reforms would also facilitate the containerization revolution and through intermodal transactions, developments that were not contemplated in 1936 when COGSA was enacted.

In supporting the MLA compromise, it should be noted that the League's position in support of the Hamburg Rules has not changed. However, to achieve what shippers feel are necessary changes to COGSA, the League takes the position that the MLA proposal achieves a number of objectives that were originally provided for under the Hamburg regime. In addition, the compromise achieves a balanced and equitable approach for shippers, ship owners and others concerned over rules affecting international cargo liability.

The League further notes that it is aware of other interest groups that may have concerns with the proposed COGSA revisions. In fact, the League has participated recently in discussions with certain groups concerning this issue and is willing to continue the dialogue with such interested parties.

The League would like to thank the Committee for the opportunity to present this testimony, and would be pleased to provide any additional information desired or answer any questions the Committee may have.

## APPENDIX A.—ANALYSIS OF COURT DECISIONS INVOLVING "NEGLIGENT NAVIGATION & MISMANAGEMENT OF SHIP" DEFENSES (1967–1983)

### CASES IN WHICH THE CARRIER WAS EXONERATED FROM LIABILITY BECAUSE IT PROVED IT WAS NEGLIGENT:

1. *Patton-Tulley, Lim. Procs.*, 1983 A.M.C. 1288 (E.D. La. 1983).

The master's decision to attempt to navigate a tugboat pushing LASH barges through the Louisiana side of the bridge in light of the prevailing channel conditions, local practice and against the advice of the helper tug, was held to be an error in navigation.

2. *Insurance Co. of N.A.* v. *G.A. Georgilas*, 1983 A.M.C. 1916 (S.D.N.Y. 1983).

Pilot caused the vessel's port bow to strike the wall on entering a lock with sufficient force to cause a crack to develop in the ballast tank plating, thus allowing the ballast water to leak into number one cargo hold. Amount of loss $90,268.

3. *Amoco Transport* v. *Mason Lykes*, 550 F. Supp. 1264, 1983 A.M.C. 1087 (S.D. Tex. 1982).

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Negligence of watch officer resulted in the collision between two vessels. Although no cargo was damaged, the shipper was required pay freight even through the voyage was abandoned. The court held that "barring the carrier from its guaranteed freight because of navigational negligence of its employees would be in conflict with the desired goal of COGSA."

4. *General Electric* v. *Lady Sophie,* 1979 A.M.C. 2554 (S.D.N.Y. 1979).

The cause of the damage was the negligent anchor watch of the second mate which resulted in the vessel being exposed to synchronous rolling, causing the turbine to be torn from its lashings on deck.] [Amount of loss $502,992.

5. *American Smelting & Refining Co.* v. *S/S Irish Spruce,* 548 F.2d 56 (2d Cir. 1977).

While the failure to have the up-to-date List of Radiobeacons was an unseaworthy condition, said unseaworthiness was not to the proximate cause of the grounding. The proximate cause of the grounding was the failure of the vessel's officers to make full use of the out-of-date List of Radiobeacons on board the vessel.

6. *Yawata Iron & Steel* v. *Anthony Shipping,* 396 F. Supp. 619, 1975 A.M.C. 1602 (S.D.N.Y. 1975).

Master's decision to head into a storm even though number one hatch cover was damaged and twisted open causing flooding in that hold, resulted in the vessel sinking. Amount of loss $1,458,014.

7. Matter of *Grace Line, Inc.* v. *S.S.S. Santa Leonor,* 1974 A.M.C. 1253 (S.D.N.Y. 1973), aff'd 517 F.2d 409 (2d Cir. 1975).

Cause of the accident was result of the pilot ordering an excessively wide port turn, which caused the ship to strike a reef on the starboard side.

8. *California and Hawaiian Sugar Co.* v. *Columbia S/S Co.,* 510 F.2d 542 (5th Cir. 1975).

Stranding of the vessel was due to the failure of the master to make proper use of the information available to him and not due to a failure to supply the vessel with appropriate charts or the malfunction of any of the vessel's navigational equipment.

9. *Complaint of Compania Naviera Epsilon,* S.A., 1974 A.M.C. 2608 (2d Cir. 1973).

The master committed the following errors: 1) the master's decision to use the One and Half Degree Channel when the navigation guides aboard the vessel recommended safer routes; 2) the master's failure to plot a course of change, which resulted in a chain of errors which caused the vessel to strand; 3) the master's failure to take into account currents affecting the vessel's course and 4) the master's decision not to use the vessel's radar.

10. *Director General of India Supply Mission* v. *S.S. Mary* (Ex. Riverhead, Ex. Theokeetor), 459 F.2d 1370, 1972 A.M.C. 1694 (2d Cir. 1972), aff'g 1972 A.M.C. 1238 (S.D.N.Y. 1971).

While the court found the vessel was unseaworthy because the only chart of the area on board the vessel was 20 years old and inaccurate, it also found that the shipper was unable to establish that this unseaworthiness was the cause of stranding . . . The vessel's legal draft was 27'09", but at the time of the stranding, the vessel was drawing 28'7.5". Even if the vessel was at its legal draft, the vessel would still have run aground due to the Master's negligent navigation, since the vessel ran aground in 24' of water. Amount loss due to shortage $6,234; salvage contribution $146,072; and general average contribution $21,760.

11. *Director General of India Supply Mission* v. *S.S. Janet Quinn,* 335 F.Supp. 1329, 1972 A.M.C. 1227 (S.D.N.Y. 1971).

Decision of the vessel's Captain and Pilot to heave up anchor and proceed through the Suez Canal instead of waiting for another vessel to pass resulted in collision between the two vessels.

12. *Wilbur-Ellis Co.* v. *M/V Capacayannis "S",* 451 F.2d 973 (9th Cir. 1971), aff'g 306 F.Supp. 866, 1969 A.M.C. 2484 (D.C. Ore. 1969).

Master's decision to proceed across the Columbia River Bar without a pilot in a storm was the proximate cause of the grounding.

13. *Insurance Co. of North America* v. *S/S Flying Trader,* 306 F.Supp. 221 (S.D.N.Y. 1969).

Master maneuvered the vessel into the trough of a heavy sea in order to pick up the pilot. The Master, in direct violation of the "Sailing Directions" negligently maneuvered the vessel to an unsafe location resulting in the heavy rolling of the vessel and loss of the cargo. Amount of loss $13,000.

14. *American Metal Co.* v. *M/S Bellvelle,* 284 F.Supp. 1002 (S.D.N.Y. 1968).

Cause of the stranding was held to be an error in navigation by the Master of the vessel and not the 10–15 mile deviation to drop off the pilot which was a common custom.

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15. *American Ind. Oil Co.* v. *M/S Alkaid,* 289 F.Supp. 329 (S.D.N.Y. 1967) 1968 A.M.C. 748.
Vessel struck a submerged object while proceeding up the East River. Since the striking of the object was either an error in navigation or a "peril of the sea," the carrier was not liable.

Senator HUTCHISON. Thank you, Mr. Augello.

And now, Mr. Walter Kramer, president of the American Marine Insurance Underwriters Association.

## STATEMENT OF WALTER M. KRAMER, PRESIDENT, AMERICAN INSTITUTE OF MARINE UNDERWRITERS

Mr. KRAMER. Thank you, Madam Chairman.

Mr. Augello just about covered my agenda, so I will kind of abbreviate my remarks.

AIMU, as we like to be called, is a trade association represented American insurers who write more than 80 percent—probably even more than 90 percent—of the cargo insurance generated in this country. Cargo insurance is sometimes referred to as transportation insurance.

This particular proposal we strongly support, and we urge Congress to act on it if they can. In this country, about one-half of the ocean marine insurance premiums, or $1 billion, comes from cargo insurance. The financial well-being of all nations, including ours, depends upon the success of foreign trade and therefore on the transportation of cargo. Cargo insurance facilitates international trade by insuring against the transit risks, including the risk of war.

Cargo insurance is inexpensive. It constitutes a very small portion of the cost of transporting goods internationally—say, one-tenth of 1 percent. This low-cost protection is, in part, possible because of the ability of cargo insurers to recover from carriers or others responsible for the cargo damage. Due to the Supreme Court decision referred to by Mr. Augello, the ability of American insurers to make such recoveries is in jeopardy.

The *Sky Reefer* decision involved a clause in a bill of lading, inserted by a foreign shipowner, requiring the U.S. importer to submit to foreign arbitration. Recovery actions against shipowners by Americans are being forced abroad in jurisdictions where recovery there is largely futile. The inevitable result will be increased costs, either increased premiums to shippers or unprofitable results for an insurer, or both.

Today insurers compete globally, but the *Sky Reefer* decision puts U.S. insurers at a disadvantage. If American marine insurers cannot pursue claims in American courts, they are forced to write off potential recoveries. Cases involving $50,000 to $100,000 in cargo damage are now being closed by American marine insurers as a result of the *Sky Reefer* case. This has a negative impact on loss experience and can easily be detrimental to U.S. policyholders, who may be forced to pay higher premiums.

AIMU believes strongly that cargo interests should have the right to pursue arbitration in this country or to pursue claims in the U.S. judicial system. That right should not be compromised by foreign shipowners. The proposed COGSA addresses this issue.

AIMU has supported COGSA reform over the past two decades. COGSA was adopted over 60 years ago, and much has changed

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since then. As has been pointed out, containerization, for example, has radically altered the way cargo is transported, but COGSA made no provision for containers and refers only to packages. The question of when a container is a package has been litigated far too often. The outdated per-package limitation of liability imposed by COGSA is inadequate, as well.

In the face of current and projected growth in international trade, modernization is necessary. The MLA proposal to revise COGSA not only remedies the *Sky Reefer* decision, but provides much-needed and long-overdue reform, and we urge its adoption.

Thank you very much.

[The prepared statement of Mr. Kramer follows:]

PREPARED STATEMENT OF WALTER M. KRAMER, PRESIDENT, AMERICAN INSTITUTE OF MARINE UNDERWRITERS

Good Afternoon. My name is Walter M. Kramer and I am President of the American Institute of Marine Underwriters ("AIMU"). AIMU is the trade association representing American insurers who write more than 80% of the ocean marine or transportation insurance generated in the United States. AIMU celebrates its 100th anniversary this year, and we are proud of it. We are also proud of the contribution AIMU members make to U.S. international commerce. A list of the members of AIMU is included in the attached brochure CARGO INSURANCE, Competition with a Difference.

AIMU is grateful for this opportunity to express our views on the proposed revision of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 et seq. The American marine insurance market strongly urges Congress to adopt the proposed revisions to COGSA. The proposal incorporates much needed reform and is widely supported throughout the maritime industries.

Perhaps some background on marine insurance would be helpful in understanding the importance of COGSA reform to our industry and to international commerce. The U.S. ocean marine insurance market writes $2 billion in direct written premiums annually. AIMU members insure the ships which carry U.S. exports and imports (hull insurance) as well as the liabilities of shipowners (marine liability and pollution). However, the single most important component of our members' premium income is cargo insurance.

In this country, one half of the ocean marine premiums, or $1 billion, comes from cargo insurance, sometimes referred to as transportation insurance. Some refer to cargo insurance as the guarantor of world trade. The financial well-being of all nations, including our own, depends upon the success of foreign trade and transportation of cargo. Cargo insurance facilitates international trade by insuring against all transit risks, including the risk of war. Most shippers have continuous or open cargo policies covering all their shipments automatically.

Cargo insurance provides invaluable protection to exporters and importers. Losses are paid directly to the owner of the cargo, essentially regardless of fault, so that international documents of sale and letters of credit can be relied upon. When cargo is damaged in transit, the parties to the sales contract can rely upon cargo insurance to pay claims swiftly throughout the world. It is then up to the cargo insurer to attempt to recover such losses from the shipowner or other party who caused the loss. The success of such recovery efforts affects directly the loss experience and premium rates paid by shippers.

Cargo insurance is inexpensive; it constitutes a very small portion of the cost of transporting goods internationally; say one-tenth of one percent. This low cost protection is in part possible because of the ability of cargo insurers to recover from carriers or others who are responsible for cargo damage. Due to an unfortunate decision by the U.S. Supreme Court, the ability of American marine insurers to make such recoveries is in jeopardy.

The *Sky Reefer* decision involved a clause in a bill of lading inserted by a foreign shipowner requiring a U.S. importer to submit to foreign arbitration. Even though cargo interests have no opportunity to negotiate the contents of a bill of lading, foreign shipowners can now unilaterally deprive American cargo owners of the right to pursue claims against them in U.S. courts. As a practical matter, forcing cargo interests abroad to pursue recoveries has lessened the protections guaranteed by the existing COGSA to American shippers.

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As a result of the *Sky Reefer* decision, recovery actions against shipowners by Americans are being forced abroad to jurisdictions where the costs of pursuing the claims, and the usually disappointing outcomes, are such that seeking recovery there is largely futile. The inevitable result will be an increase in costs: either in increased premiums to the shipper or unprofitable results for the insurer, or both.

Cargo insurance is extremely competitive. Today, insurers compete globally. An account in Boston may be placed with insurers in Europe or Asia. American marine insurers must be in a position to meet this global competition. If American marine insurers cannot pursue claims in American courts, they are forced to decide between certain high costs in unpredictable foreign legal systems or simply writing off the claims. Either choice will eventually add significantly to loss ratios. If the American insurer raises premiums, it could lose the account to a foreign insurer who faces no such restriction. We know of no other country which similarly permits the restriction of access to its own courts.

Now, AIMU members are being forced to forgo claims against carriers responsible for the losses. It is not just the small claims which are being written off. Many cases involving $50,000 to $100,000 in cargo damage are now being closed by American marine insurers as a result of the *Sky Reefer* case. The resulting negative impact on net loss experience will be detrimental to U.S. policyholders who may be forced to pay higher premiums, possibly making them less competitive.

AIMU strongly believes that American cargo interests should have the right to pursue arbitration in this country or to pursue claims in the U.S. judicial system. That right should not be compromised by foreign shipowners who impose such clauses in contracts of adhesion, burdening American shippers unfairly.

The proposed revision of COGSA developed through the Maritime Law Association of the United States contains a provision which would remedy the *Sky Reefer* problem. But AIMU's support for this reform legislation goes far beyond this one vital improvement. The MLA proposal constitutes comprehensive reform of the liability scheme for damage to cargo in international maritime commerce. The proposal is a compromise among the various interests. We believe it is the best available solution to long-standing problems with COGSA.

AIMU has supported COGSA reform for the past two decades. COGSA was adopted over sixty years ago, and much has changed since then. Containerization has radically altered the way cargo is transported. But, COGSA made no provision for containers and refers only to packages. "When is a container a package?" has been a question litigated far too often. The outdated per package limitation of liability imposed by COGSA is inadequate. The MLA redraft of COGSA addresses both of these problems.

In the past, AIMU supported the revision of COGSA through the adoption in this country of the Visby Amendments to the Hague Rules. AIMU actively participated in the final drafting of the MLA proposal. The MLA proposal adopts reforms similar to the Visby solutions to problems such as how to define a package and the need for an increased package limitation. While international uniformity remains our basic goal, AIMU believes that the compromise worked out through the MLA offers the best chance for much needed COGSA reform. We simply cannot afford another decade without reform.

Today, insurance of international shipments is becoming increasingly important to world economies. Ten years ago, international trade accounted for only 10% of the world domestic product. Today, it constitutes 20% or about $30 trillion. U.S. companies are going global in record numbers. Five years ago, only 400,000 U.S. companies engaged in exports. This year, the U.S. Department of Commerce expects 1.2 million U.S. companies to export. By the year 2015, that number is expected to double.

In the face of this current and projected growth in international trade, a modern system for allocation of responsibility for cargo damage is necessary to world commerce and is vitally important to U.S. marine insurers. The MLA proposal to revise COGSA would provide much needed reform and we urge its adoption.

AIMU would be pleased to provide any assistance to the Subcommittee in its deliberations. We look forward to the opportunity to review the legislation as it is introduced in the Senate. Please let us know if there are any questions.

SUMMARY

The American marine insurance market strongly urges Congress to adopt the proposed revisions to COGSA. The proposal incorporates much needed reform and is widely supported throughout the maritime industries. In this country, one half of the ocean marine insurance premiums, or $1 billion, comes from cargo insurance, sometimes referred to as transportation insurance. The financial well-being of all

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nations, including our own, depends upon the success of foreign trade and transportation of cargo. Cargo insurance facilitates international trade by insuring against all transit risks, including the risk of war.

Cargo insurance is inexpensive; it constitutes a very small portion of the cost of transporting goods internationally; say one-tenth of one percent. This low cost protection is in part possible because of the ability of cargo insurers to recover from carriers or others who are responsible for cargo damage. Due to an unfortunate decision by the U.S. Supreme Court, the ability of American marine insurers to make such recoveries is in jeopardy. The *Sky Reefer* decision involved a clause in a bill of lading inserted by a foreign shipowner requiring a U.S. importer to submit to foreign arbitration. Recovery actions against shipowners by Americans are being forced abroad to jurisdictions where recovery there is largely futile. The inevitable result will be an increase in costs, either in increased premiums to the shipper or unprofitable results for the insurer, or both.

Today, insurers compete globally but the *Sky Reefer* decision puts U.S. insurers at a disadvantage. If American marine insurers cannot pursue claims in American courts, they are forced to write off potential recoveries. Many cases involving $50,000 to $100,000 in cargo damage are now being closed by American marine insurers as a result of the *Sky Reefer* case. The resulting negative impact on net loss experience will be detrimental to U.S. policyholders who may be forced to pay higher premiums, possibly making them less competitive. AIMU believes strongly that American cargo interests should have the right to pursue arbitration in this country or to pursue claims in the U.S. judicial system. That right should not be compromised by foreign shipowners.

AIMU has supported COGSA reform for the past two decades. COGSA was adopted over sixty years ago, and much has changed since then. Containerization has radically altered the way cargo is transported. But, COGSA made no provision for containers and refers only to packages. "When is a container a package?" has been a question litigated far too often. The outdated per package limitation of liability imposed by COGSA is inadequate. In the face of current and projected growth in international trade, modernization is necessary. The MLA proposal to revise COGSA would provide much needed reform and we urge its adoption.

Senator HUTCHISON. Thank you, Mr. Kramer.

Now, Mr. Jon Roethke, the director of Risk Management for Sea-Land Service.

## STATEMENT OF JON ROETHKE, DIRECTOR OF RISK MANAGEMENT, SEA-LAND SERVICE, INC.

Mr. ROETHKE. Thank you, Senator Hutchison, for asking me to testify before you today. I would like to have my written remarks made a part of the record, please.

Senator HUTCHISON. Without objection.

Mr. ROETHKE. I am a graduate of Kings Point and an attorney. I have been with Sea-Land for 37 years and actively involved in the insurance and claim-handling work for my company. I think I am the only person representing a carrier here today, and I believe you will find my remarks particularly interesting.

We are the largest container operator in the United States. We operate a fleet of 98 vessels. We operate those vessels in domestic and international trade. We carry approximately 1.6 million loads per year in those vessels. We carry anything from television sets to the food you eat to the building supplies that are used in your homes to pharmaceuticals—just about anything that will fit in a container. So I think there is a real interest not only by consumers, but by the manufacturers and suppliers of those products, who move them aboard our vessels and the vessels of the remainder of the U.S. Merchant Marine fleet.

A significant part of my work involves the handling of about 10,000 claims per year submitted by Sea-Land's customers for loss or damage to cargo. I think that, without sounding immodest, it

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puts me in a pretty good position to make some comments here that I believe are very germane to some of what some people consider to be issues.

In 1991 and prior to that, Sea-Land had been part of the effort to get this proposal before you here today. Things were moving kind of slow. We recognized that the law was very, very old and archaic, and we wanted to do something about that for our own customers and for our business. So we modified our bill of lading in 1991. As a result, our bill of lading has just about everything in it that the proposal before you today has.

I would like to comment specifically on what I believe are the two most significant provisions of this proposed bill. The first of these is the error in navigation defense, which you have heard about today. What this means, Senator Hutchison, is that if two vessels are involved in a collision at sea, as a result of the negligence of a master or a mate or a crewmember—whatever it may be—and the cargo is lost or damaged, the carrier, under the current law, is exonerated from any liability for that loss. Now, it sounds like I am speaking for cargo interests rather than for a carrier, and I am, because cargo owners are our customers. We have never, in all of our experience, had a loss of an operated vessel. Even though we have had collisions, we have never had a loss involving a collision that caused damage to cargo or loss to cargo. We do not anticipate having collisions, but if we do and we are wrong, we will pay for the losses our negligence causes. The proposed bill would require all carriers to do that.

The other significant provision of the proposed bill concerns limitation of liability. We increased that voluntarily by adopting, in our bill of lading, in 1991, The Hague-Visby Rules, which is the essence of this proposal, in terms of limitation of liability.

My experience with our adjusters in Dallas and Hong Kong and Rotterdam has shown that the losses of our customers are limited only infrequently. Under this proposal, owners of cargo will be paid in full by all carriers in almost every case.

The last thing that I would like to mention is that this proposal does put a greater degree of responsibility on the carriers. Hopefully that will cause the carriers to pay more attention to their safety programs and their loss prevention programs, to prevent the losses from occurring in the first place. If you can do that, you are going to have a satisfied customer, delivery of cargo in good condition, and an improved bottom line.

Thank you very much for your attention. If there are any questions, I would be more than happy to try to answer them.

[The prepared statement of Mr. Roethke follows:]

PREPARED STATEMENT OF JON ROETHKE, DIRECTOR OF RISK MANAGEMENT, SEA-LAND SERVICE, INC.

Senator Hutchison and members of the subcommittee. My name is Jon Roethke. I am the Director of Risk Management for Sea-Land Service, Inc. I am a graduate of the United States Merchant Marine Academy at Kings Point and am an attorney. I have been an active member of the Maritime Law Association of the United States (MLA) since 1962 and am a member of the Ad Hoc Study Group of that Association which is proposing this change to the Carriage of Goods by Sea Act.

Sea-Land, one of the largest ocean carriers in the United States, owns, operates, or charters a fleet in excess of 70 vessels in international and domestic commerce. We move approximately 1.3 million shipments each year. These shipments consist

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of just about any item that will fit into a container, including refrigerated food, clothing, automobiles, electronic goods, building materials and equipment, bulk liquid, chemicals, and pharmaceuticals.

I have been actively involved with the risk management functions at Sea-Land for the past 37 years. A significant part of that work includes the responsibility for managing the handling and disposition of approximately 10,000 claims annually resulting from allegations of cargo loss and damage. These claims total in excess of 25 million dollars. The incidents upon which the claims are based occur at sea aboard our vessels, in port at our terminals, or during inland transportation by rail or truck. Our liability to our customers for all loss or damage, from the inland point of origin to the inland point of destination anywhere in the world, whether at sea or on land, is governed primarily by the Sea-Land International Through Bill of Lading. Until 1991 the Sea-Land bill of lading incorporated the current Carriage of Goods by Sea Act (COGSA), which was enacted in 1936, one year before I was born. In 1991, we at Sea-Land took it upon ourselves to bring our bill of lading more into conformity with modern international trade. In the process of doing that, we voluntarily adopted many of the provisions of the Hague-Visby Rules, which provide much of the substance in the proposal before you today.

Mr. Hooper has commented on some of the changes this proposal will accomplish if enacted into law. I would like to spend a brief time on the two changes that Sea-Land considers to be the most significant.

Under existing law (COGSA 36), an ocean carrier is generally not liable for loss or damage to cargo as a result of an "error of navigation." For example, if a carrier's vessel is involved in a collision with another vessel due to a misjudgment of the master resulting in loss or damage to cargo, the carrier is usually exonerated from liability to the shipper of the cargo under COGSA 36. To put this in perspective, this is akin to a trucking company moving your household goods being able to avoid liability if your possessions are destroyed when the driver falls asleep at the wheel and runs off the road. This is unthinkable ashore but sanctioned under COGSA 36 for maritime losses. Sea-Land does not believe it is good business for an international ocean carrier to treat its customers that way. The proposal before you eliminates this defense and subjects international ocean carriers to liability for fault, which is a fundamental concept of the shoreside law in all civilized countries.

The second significant change that this proposal will accomplish is an increase in the existing limits of liability available to a carrier when it is at fault. Under existing maritime law in this country, an ocean carrier is only responsible for a maximum of $500.00 per package (or, for goods not shipped in packages, per customary freight unit). There are thousands of cases every year involving U.S. international ocean commerce where carriers legally limit their liability to $500.00 for goods valued in the thousands, hundreds of thousands, and, yes, even millions of dollars! The new COGSA would eliminate this onerous provision and would adopt a new and realistic application of limitation that affords recovery of full value in the majority of cases where liability is proven.

It is primarily for these two major changes that Sea-Land urges you to give favorable consideration to the proposal before you. Under the proposed bill, manufacturers and consumers of goods transported internationally by sea will be able to recover for losses caused by carrier neglect and will recover full value in almost every case. Last but not least, changing the existing law will provide further reasons for all carriers to be more pro-active in their loss prevention programs.

Thank you very much for this opportunity to testify before you today. I appreciate your patience and will be glad to answer any questions that you may have.

Senator HUTCHISON. Thank you. You certainly do bring a unique perspective, which I think is interesting.

Mr. WILLIAM WOODRUFF. And you are from Houston, TX, representing the American Waterways Operators.

## STATEMENT OF WILLIAM MATHEW WOODRUFF, PARTNER, EASTHAM, WATSON, DALE AND FORNEY, LLP, REPRESENTING THE AMERICAN WATERWAYS OPERATORS

Mr. WOODRUFF. Madam Chairman, my name is Matt Woodruff, and I thank you for the opportunity to appear today to present the views of the American Waterways Operators and those of Coastal Towing, which is an AWO member company from Houston.

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I am a partner in the Houston law firm of Eastham, Watson, Dale and Forney, which is one of the oldest maritime practices in Texas. In 1992, I left the firm and joined Coastal Towing, where I was vice president and general counsel. Coastal Towing operates over 100 barges and 30 towboats in the inland waters of the United States, and is the Nation's largest inland transporter of residual oil products.

During my time at Coastal, I became a member of the Board of Directors of AWO. I am also the immediate past president of the Texas Waterway Operators Association, which joins in AWO's position on COGSA.

I returned to the law firm on January 1 of this year, but I continue to serve as counsel to Coastal Towing and represent it on the AWO Board.

AWO is a national trade association of the inland and coastal tugboat, towboat and barge industry. And contrary to what Mr. Roethke said, we do speak for carriers. We are the largest component of the U.S.-flag fleet. We operate more than 6,000 towboats and tugboats, and over 30,000 barges, employing over 33,000 people as crew members on those vessels.

We move cargo ranging from coal and corn to rocket parts. We operate on waterways across America and along every coast. To give you a sense of our geographic diversity, even though Coastal Towing is based in Houston, its vessels operate from Corpus Christi to Mobile on the Gulf Coast, and as far as Kansas City, Minneapolis, Chicago, and Pittsburgh, on the river system. It has employees based throughout that operating area.

And the inland industry is a vibrant and strong industry. Our members are the safe and efficient foundation of today's U.S.-flag merchant fleet. We move 15 percent of the Nation's cargo for only 2 percent of the Nation's freight cost. And we have fewer polluting emissions and accidents per ton mile than our competing modes of rail and truck transportation.

Our message here today is quite simple. There is nothing wrong with COGSA that justifies a total overhaul of the Act. The current law serves our needs well. And to the extent that others can show that there is a need for changes to specific sections of COGSA, then specific amendments should be considered. But these individual problems should not be used as an excuse to rewrite the entire law.

Some say COGSA does not affect the inland and coastal operators. But this is not true. Though the current Act does not apply directly to inland and coast-wise trade, many domestic shippers and carriers incorporate COGSA into their contracts because it is a predictable, fair, established means of allocating fault or risk of loss of cargo between the carrier and the shipper.

Others elect not to incorporate COGSA, and instead negotiate their own agreements to allocate the risk of cargo loss. Both the AWO members who incorporate COGSA in their contracts and those who do not have voiced opposition to a COGSA overhaul. Those who incorporate COGSA oppose change because it will upset traditional relationships that serve them well.

Those who do not are concerned that the expansive definitions, as contained in the MLA proposal, will extend the Act's coverage to movements never before within the realm of COGSA, thus lim-

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iting their ability to negotiate as they wish. Even harbor tug operators are concerned that they will become carriers under COGSA, simply as a result of assisting a ship into its berth.

All our members, regardless of their current use of the Act, seem to agree that the principal effect of an overhaul would be to keep maritime lawyers busy into the next millennium, litigating the meaning of each new provision. The status quo provides a predictable basis for setting freight rates and insurance premiums. A significant change to COGSA will create uncertainty and increase costs as underwriters and carriers adjust rates. Parties to long-term transportation contracts may find themselves with different liabilities than they bargained for, but no means of adjusting their rates to compensate.

The consumer eventually pays insurance and transactional costs incurred by both carriers and shippers. If COGSA is radically altered, the consumer will bear these costs and, perhaps most significantly, the legal fees that will be incurred by all concerned as they struggle to define the bounds of the Act.

In sum, we feel there is no reason to radically alter the commercial landscape of the domestic tugboat and towboat industry in order to correct problems other segments of the industry perceive with specific provisions of the current Act. We think that justice will be best served by applying tailored changes to specific problems. We think that the committee should critically examine the need for a comprehensive overhaul, and also carefully consider its cost to American business and consumers. And we think that the proposed provision will fail under that scrutiny.

A couple of other points. We have heard, at least insofar as Sea-Land is concerned, they have never needed the error in navigation defense, so it does not bother them to negotiate it away. And I think that is one of the problems we see, where you get into a quid pro quo negotiated arrangement, where everyone is giving and getting. Sometimes they take what should be a simple concept and then spread the effects of that beyond what they ever intended. In this case, they have spread it to cover a domestic industry that did not have a problem to begin with.

Thank you. I would be happy to answer any questions.

[The prepared statement of Mr. Woodruff follows:]

PREPARED STATEMENT OF WILLIAM MATHEW WOODRUFF, PARTNER, EASTHAM, WATSON, DALE AND FORNEY, LLP, REPRESENTING THE AMERICAN WATERWAYS OPERATORS

Madame Chairwoman, Senators and staff, my name is Matt Woodruff. First of all, I want to thank you for the opportunity to appear today and present the views of The American Waterways Operators (AWO) and those of Coastal Towing, Inc., an AWO member company from Houston, Texas. The Texas Waterways Operators Association also joins in AWO's position on COGSA.

I am a partner in the Houston law firm of Eastham, Watson, Dale and Forney, LLP, one of the oldest maritime law firms on the Texas coast. I joined the firm in 1984 and represented a number of marine transportation companies and their underwriters, focusing especially on the U.S. inland and coastal fleets. In 1992, I left the firm and joined Coastal Towing, where I served as Vice President and General Counsel. Coastal Towing operates over 100 barges and 30 towboats on the Gulf Intracoastal Waterway and the Western Rivers of the United States, essentially the Mississippi River and its tributaries. Coastal Towing is the largest inland transporter of residual oils and feedstock in the United States. During my time at Coastal, I became active in industry affairs, including the Texas Waterways Operators Association, of which I am immediate past President, and The American Waterways

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Operators, of which I became a member of the Board of Directors in 1997. I returned to the law firm on January 1st of this year, but I continue to serve as Counsel to Coastal Towing and represent it on the AWO Board.

I would like to present just a few additional facts to put my testimony on COGSA into perspective. AWO is the national trade association of the inland and coastal tugboat, towboat and barge industry. This industry:

- Is the largest component of the U.S. flag fleet. We operate over 6000 tugboats and towboats and over 30,000 barges. We directly employ on our vessels alone over 33,000 people and carry 15% of the country's inter-city freight. In 1996, that accounted for over 622 million tons of cargo.
- While we mainly move bulk cargoes, like coal, petroleum, farm products and chemicals, we also move general cargoes ranging from steel coils to rocket parts.
- We operate on over 26,000 miles of waterways across America and on every coast. To give you a sense of the geographic diversity of our industry, even though Coastal Towing is based in Houston, its vessels operate from Texas to Alabama along the Gulf and as far as Kansas City, Minneapolis, Chicago and Pittsburgh on the rivers. It has full time shore based employees in Texas, Louisiana, Kentucky, Illinois and Missouri. Coastal's vessel crews live across the Gulf Coast and throughout the Midwest.

In sum, AWO's members are the foundation of today's U.S. flag merchant fleet. We are also safe and efficient. We move 15% of the nation's cargo for only 2% of the nation's freight cost. We have fewer polluting emissions and accidents per ton mile than our competing modes of rail and truck transportation.

Having said who we are, our message today is simple:

> There is nothing wrong with COGSA that justifies a total overhaul of the Act. The current arrangement serves the needs of our industry well. To the extent other interests may show that justice requires changes to specific sections of COGSA, these amendments should be considered. But, these individual problems should not be used as an excuse to rewrite the entire law.

Although some may say that COGSA does not affect the inland and coastal operators who make up AWO, this is not true. Even though the current Act does not apply directly to inland and coastwise trade, its terms have been incorporated by reference into many contracts for the domestic transportation of bulk materials. Most inland and coastal marine transportation involves bulk commodities. Many domestic shippers and carriers of bulk cargo elect to incorporate COGSA by reference because it is a predictable, fair, established means of allocating the risk of loss of cargo between the carrier and shipper and their insurance companies. Others elect not to incorporate COGSA's terms and instead reach their own agreements as to allocation of risk for cargo loss.

Both the AWO members who incorporate COGSA and those who do not have voiced opposition to the concept of a COGSA overhaul. Those who incorporate COGSA oppose change because it will upset traditional relationships that serve them well. Those who do not are concerned that the expansive definitions of some proposals will extend the Act's coverage to movements never before within the realm of COGSA, thus limiting their ability to negotiate as they wish. Even harbor tug operators are concerned that they will become carriers under COGSA simply by assisting a ship into its berth. All our members, regardless of their view on the Act, seem to agree that the principal effect of an overhaul would be to keep maritime cargo lawyers occupied well into the next millennium, establishing the new body of case law needed to clarify the limits of each new provision.

Our current system of COGSA utilization provides a predictable basis for setting freight rates and insurance premiums. For carriers and shippers buying and selling transportation on the spot market, a significant change to COGSA will create a period of uncertainty and increased costs as underwriters and carriers adjust rates. The effect will be more profound on those with long-term transportation contracts, where rates were set in anticipation of the application of the current liability scheme. These parties may find themselves with differing liabilities and no mechanism to adjust their rates to account for them.

The consumer eventually pays for both the carrier and shipper's insurance premiums and the transactional costs associated with claims. If COGSA is radically altered, the consumer will bear the increased transactional costs associated with revising rates structures and perhaps most significantly, the legal fees that will be incurred by all concerned as they struggle to define the bounds of the new act.

In sum, there is no reason to radically alter the commercial landscape of the domestic tugboat and towboat industry in order to correct problems other segments of the industry perceive with specific provisions of the current Act. Justice will be best served by applying tailored changes to specific problems. We believe the committee should question critically the need for this comprehensive overhaul and care-



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fully consider what those who recommend the overhaul stand to gain thereby. This proposal fails under that scrutiny.

Thank you for your consideration. I would be pleased to answer any questions you have.

Senator HUTCHISON. Thank you.

I do not mean to be too facetious, but I wondered if you had cleared your testimony with your law partners?

Mr. WOODRUFF. I spoke to some of my law partners, who said they did not see any problem with increased liability costs, especially the ones who practice cargo law. [Laughter.]

Senator HUTCHISON. That is what I thought.

Mr. WOODRUFF. But my clients who pay my bills see it otherwise.

Senator HUTCHISON. Let me just ask you, though, it seems to me that every facet of the industry that is directly affected is pleased enough with the bill to be supportive. I will not say that everybody loved every part of it, but they have come to terms with it. But your industry, which is not really directly affected, is more concerned about it. And I just wonder if there is another alternative for the standard in the towing industry or the inland navigation industry that would allow it to set its own standards and not keep the rest of the industry from having a bill that would be workable for the majority of the industry.

Mr. WOODRUFF. One thing I think is that there is not uniform agreement by everyone but the towing industry that this bill is the right step. If you look in the MLA's own package, the international group of P&I clubs, which is the primary group that insures the shipowners, is opposed to this. The International Chamber of Shipping is opposed to this. And there are other groups, representing carriers, who may not be here today, but, nevertheless, oppose these provisions.

These provisions do affect the inland carrier, not just by incorporation by reference, but by the fact that this proposal will extend COGSA into certain domestic transport. And so I think that if we truly want uniformity and something that everyone can agree with, I think the course of action that the United States should take is one that is in concert with its trading partners.

In order, instead of adopting our own Act and going off by our self, we can get with our trading partners and work toward a uniform international convention, so that we do have true uniformity in ocean carriage.

Senator HUTCHISON. Let me just ask you again, why couldn't you not incorporate COGSA if you do not like the changes in your contracts and negotiate separately with a set of standards that would eventually become part of the tradition in the towing industry?

Mr. WOODRUFF. COGSA provides a good starting point. While it is true today that we have the ability to negotiate on either side of that—we and the shippers can do that—a lot of that ability will be lost under this Act. If you take, for example, a tank barge operator in Houston, who goes to a terminal and fills six tanks on the barge full of a chemical product. They sail that barge across the ship channel and they pump three of the tanks into a shore tank on the other side and three of the tanks into a ship that is sailing foreign.

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Under the proposal, COGSA would apply to the three tanks on the barge that are going into the ship. It would not apply to the three tanks that are going into the shore tank. So there is a situation where you have instead of promoting uniformity, you have created two separate bodies of law, one that applies to half the cargo on the barge, one that applies to the other half. So we do not see that it promotes uniformity or allows us to opt out of it.

Senator HUTCHISON. All right.

Mr. WOODRUFF. And that is one of the reasons that Texas waterway operators oppose this, because of those issues.

Senator HUTCHISON. Well, let me just say that I would hope that we could work with the inland waterways organizations to give them something that they are more comfortable with. But I also believe that it is within their jurisdiction to be able to negotiate their own contracts. And for whatever is not covered under COGSA, then I just think there is the freedom to go your own way.

So I do not want to hold up the bill for an industry that is not directly affected, but I do want to see if there is a way that we could make it more acceptable, so that you would feel comfortable with it, if we possibly can.

Mr. WOODRUFF. I think the way that we believe that could be done is instead of starting with the MLA proposal as a baseline and figuring out how to correct it to address our needs, I think we could take the existing COGSA as a baseline, and make the adjustments necessary to address the valid issues that have been raised at this table by others. It seems to us that when you do the massive overhaul is when you get into the unintended consequences that really are not a part of the problems that have been identified with COGSA.

Senator HUTCHISON. Would anyone like to speak to what we would lose in the present bill if we took his approach?

Mr. HOOPER. If I could start off, Madam Chairman, and by the way, I forgot to ask if my written submission will be included in the record.

Senator HUTCHISON. It will.

Mr. HOOPER. The compromise is a delicate compromise amongst all sectors, most sectors of the ocean transportation industry. There was a lot of give-and-take from 1992 through 1996 when we completed our project. It would be very difficult to undo some of that.

I could see adding some language which would specify that the towage contracts are not governed. It does not govern them, but if they want that specified clearly I could see no problem in specifying that clearly, and let the towage companies, as you mentioned, negotiate whatever they wish to negotiate on the international front.

There is some trouble with changing the Act, particularly the error of navigation point. At this same time we have the International Association of Maritime Law Associations, the Comité Maritime International, attempting to draft a new international treaty. That will be submitted to the United Nations Commission on International Trade Law, which hopefully some day will become a new treaty.

We fear that if the United States does not enact this law at this time, eliminating the error of navigation defense, the Comité Mari-

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time International and our international trading partners will retain the error of navigation defense in their treaty and we will end up with a treaty that our country is not willing to ratify.

I believe that if we do adopt the bill as it is now, giving up the error of navigation defense, our trading partners will follow us and the Comité International will follow us. The United States will provide leadership just as it did in the Harter Act of 1983, which started world uniformity in that era, and I believe it is time to do that again.

Senator HUTCHISON. Mr. Augello.

Mr. AUGELLO. Madam Chairman, we have already followed the suggestion that the AWO has submitted. We could have adopted the Hamburg rules, which would have been a complete departure from COGSA. We did not do that. We started with COGSA. We addressed each individual section that needed modification.

Since the inland operators are already exempt under present COGSA, there's no reason why they cannot amend their contracts to include the present version of COGSA, very simple, and retain their present exemption.

Senator HUTCHISON. Or the new one.

Mr. AUGELLO. They would retain the old COGSA and incorporate that into their contracts, which would include the negligent navigation defense. We do not oppose their suggestion that because of shifting channels they have to have the negligent navigation exclusion, or defense. We do not oppose that, but we feel that they are already exempted, and they should not hold up this bill, which is of such importance to all importers and exporters in the United States.

Senator HUTCHISON. Any other comments on this point?

All right. Let me just ask Senator Wyden if you had questions of this panel.

Senator WYDEN. Madam Chair, I do not.

Senator HUTCHISON. I knew you were interested in the second panel. I want to thank all of you, and I do think this is a good bill, and I would like to continue to work with any of those who are opposed to it, Mr. Woodruff or any other organizations, to see if there is anything else we can do that would satisfy the concerns of the Inland Waterway Association, because it is an important one and it is a big one, and it certainly is part of our system of transportation.

I hope you will continue to work with my staff as we go forward, but I would like to pass a COGSA reform bill, because I think it really is necessary. I think there are some concerns that have been laid out very well by this panel that need to be addressed, and so I would like to be able to do it so that everyone feels that it is an improvement and we will go forward and try to work that out.

We will start the second panel and I would call up Mr. John Sleavin, Mr. Paul Hofmann, and Mr. Eric Danoff.

Let me start by welcoming all of you, and I apologize for the lateness of the start of our hearing. As Senator Wyden knows, we were on the floor until about 3:30, so everyone is running late, but Mr. Sleavin, I would like to start with you and welcome you to the committee.

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## STATEMENT OF JOHN SLEAVIN, PORTLAND, OR

Mr. SLEAVIN. Thank you, Madam Chairman, Senators. I want to thank you for letting me testify before you today, and I especially want to thank you, Senator Wyden, for bringing my plea for justice to the committee and the attention of Chairman Hutchison and Chairman McCain. I ask that the committee print my entire written statement into the hearing record.

Senator HUTCHISON. Without objection.

Mr. SLEAVIN. Thank you. It is a great honor to be here and to be heard by you. I have come as a private citizen representing my family, both alive and dead. I have not come here representing an interest group. No one I know will benefit financially from changing the DOHSA law.

I have come at my own expense to Washington, and for what? I have come for justice. I have come for peace. It may sound trite, but it is true, as is my cause. I have come to make sure that you see to it that there is justice on the high seas and to bring peace to me, my family, and all of those who cross the high seas and peace to Judith, my devastated sister-in-law.

I will relate to you the last hours of my brother Mike, my niece, Annie Rose, and my nephew, Benjamin, and the horror that follows my sister-in-law, Judith, to this day, and if this is not enough, I will let you know the injustice of DOHSA as it is written and leave in your hands, the ability to bring justice to the high seas and to bring peace to all who cross the high seas.

The following is from depositions of Judith Sleavin and the Korean freighter personnel. On November 16, 1995, the yacht *Melinda Lee* departed from Tonga for passage to the Bay of Islands, New Zealand. *Melinda Lee* was a 47-foot sailing yacht owned by Mike and Judith Sleavin. They were accompanied by their two children, Benjamin Timon Sleavin, age 9, and Annie Rose Sleavin, age 7.

The *Melinda Lee* was equipped with up-to-date navigation safety equipment, including collision avoidance radar detector, fibular radar detectors, four auxiliary boats consisting of six-person Goodyear inflatable life rafts equipped with survivor gear and provisions, an 8-foot sailing dinghy, a 7-foot Avon inflatable raft, an 11-foot ABS inflatable dinghy with a hard bottom, three VHS radios, navigational lights, an abandon-ship bag with emergency supplies and equipment, and seven foam type and four inflatable floating devices. My brother was nothing if not fanatical about safety.

They had been waiting at Tonga as part of a group of 27 or 28 yachts for favorable weather conditions before commencing the voyage to New Zealand. The *Melinda Lee* sailed from Tonga November 16, 1995.

When Judith's 15-minute alarm watch sounded at 2 a.m. on November 24, 1995, Judith followed her 360-degree observation, one approaching landfall consistent with good practice, in accordance with maritime law. Hourly she went below to the navigation station to obtain positions of the *Melinda Lee* on the GPS and then returned to the cockpit.

On November 23, 1995, the *Pan Grace*, a 540-foot carrier low with logs departed from the Port of Tonga, New Zealand en route to Inchon, Korea. Mr. Han of the *Pan Grace* testified that the auto-

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matic radar plotting aid had not been turned on between the hours of midnight and 2 a.m. November 24. APR, in conjunction with the *Pan Grace*'s main radar provided automatic and long-range scanning.

Although 72 COLREGS, Rule 7 requires use of all available means, including use of the ARPA, to determine if risk collision exists, Mr. Han saw fit not to turn on the available aid to navigation. ARPA use is especially critical in poor sea conditions.

Sometime between 1:30 and 2 a.m., November 21, the helmsman advised Han that he saw a dim light to starboard. Mr. Han estimated that the light was 30 to 40 degrees starboard of the bow. He recognized the red light meant he was observing the port side of a crossing vessel from the *Pan Grace* starboard side, and that the *Pan Grace* was in a give-way situation.

He made no attempt to reach the *Melinda Lee* over Channel 16 of the VHF radio to determine its course, intentions, or notify the *Melinda Lee* of the approach of the *Pan Grace*. The last time Mr. Han saw the red light, the bow was slightly to starboard. Mr. Han thought that the vessel probably passed the port side and never saw a red light on the port side.

Judith was below when she heard three loud booms on the side of the boat. Immediately she felt the hard blow to the back of the right of her ear and was pushed down inside the cabin. The cabin in the *Melinda Lee* filled with a rush of sea water and diesel oil. When Judith reached the deck, the forward cockpit, the *Melinda Lee* was 4 inches underwater. Mike and Annie Rose were on the deck, but Benjamin was not. The *Melinda Lee* was going down rapidly. The mast, rigging, hatch covers, 7-foot Avon dinghy, and most critically, the Goodyear life raft and cradle had been sheared from the deck. All that remained was a half-inflated 11-foot ABS hard bottom inflatable.

Mike ordered her to get into the dinghy with Annie Rose, telling her he would go get Benjamin. The *Melinda Lee* was rapidly submerging. Judith frantically told Mike that he would not be able to see through all the diesel oil and debris, and that he would be trapped in the cabin and that she would lose both he and Benjamin. Judith got into the dinghy and the deck of the *Melinda Lee* was now 15 inches below water, the cabin filled with oil, diesel and debris, and sinking rapidly.

Mike realized that an attempt to rescue Benjamin would be futile and that Benjamin was trapped in the sinking vessel. Mike swam to the dinghy. Annie Rose became hysterical over the loss of her brother Benjamin. At about 2:20 a.m., Mike said, "There is the ship" which rammed them. It was turning starboard, and there were no visible navigation lights on the vessel, no red or green side lights, mast lights, or stern lights.

Judith estimated the vessel was a couple of hundred feet away, moving quickly. The area around the dinghy had been becalmed by diesel oil on the surface from the escaped tanks of the *Melinda Lee*. All the emergency provisions were in the Goodyear raft. There had been no chance to get the abandon-ship bag. Both Mike and Annie Rose, who were dressed only in their sleepwear, had swum to their safety from the flooded cabin. They were now 50 miles from shore in the cold southern ocean.

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Mike, Judith, and Annie Rose stood up in the dinghy and yelled as loud as they could, "Help us, save us, help us." Judith said they just kept going. They never slowed down. They came within 50 feet of us, and they just left us to die.

When the lights of the *Pan Grace* had come into view—Judith saw approximately three rows of vessel lights from the windows—the vessel circled around the dinghy from the port to starboard and then left.

After a short time, the remaining members of the Sleavin family became very cold. Judith took off her jacket and gave it to Annie Rose. Mike began shivering from the cold but refused to wear Judith's overalls, telling her, "If you give me the overalls we will all die. At least you two have a chance."

It became progressively colder, and it was apparent that Mike was suffering from hypothermia. Annie Rose kept trying to talk to Mike. He had become delusional.

During the morning of November 24 a large wave broke over the dinghy, washing Mike, Judith and Annie Rose from the dinghy. Judith got back to the dinghy and Mike went after Annie Rose. She drowned before he could get to her. All Judy saw was her daughter's floating body. When Mike realized she was dead and he couldn't make it back to the dinghy and was being swept away he looked into Judith's eyes, waved goodbye, and sank below the surface.

Annie Rose and Mike died somewhere between 10:25 a.m. and 10:45 a.m. of November 24, approximately 8½ hours after the *Melinda Lee* was rammed by the *Pan Grace*. There would have been more than adequate time for the New Zealand coastal search and rescue and other ships to come to their aid had the *Pan Grace* notified New England authorities of the disappearance of the vehicle from its bow.

This could have occurred in spite of the failure of the *Pan Grace* to stand by and rescue, if only the vessel had broadcast the disappearance over Channel 16 and notified the New Zealand search and rescue agency.

Judith Sleavin finally washed up on the shores of New Zealand, being rescued 62 hours later. She was delusional, had head injuries, could feel nothing below her waist, and she was flown by helicopter to a hospital in New Zealand where she was kept for over a month.

To this day, Judith still has flash-backs. She was sitting in a room and for hours her dead daughter and husband are floating face down on the carpet in front of her. She has head injuries which have left her disabled. She has extreme attacks of anxiety—and I could go on and on about the horrors of the past 2½ years for Judith, a horror that is not likely to end any time soon, and for all of this the Korean ship's failure to give way, the Korean ship which did not post a watch, the Korean ship which returned to my family floating in the sea and then abandoned them, the Korean ship that did not even radio anyone to begin a search and rescue mission—all of this, and what does DOHSA, a 1923 maritime law say? That the Koreans only have to pay for the value of the vessel, the *Melinda Lee*, and for the future lifetime earnings of my brother.

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They got to kill my nephew and niece for free. If they would have been lucky enough to have Judith die at sea they would have only had to pay for the value of the *Melinda Lee*. That is, assuming that they were caught.

The only court that can prosecute the Koreans for the criminal acts is a Korean court. So far, 2½ years later, they have failed to do anything, nor is it likely they ever will. DOHSA, which applies in U.S. courts, does not allow for punitive damages against the Koreans.

I ask you, Senators, men and women of this great institution, the U.S. Congress, is this justice? Did you come to Washington to allow these types of laws to stay as they are, laws that are good for Korean freighters at the cost of American children's lives?

Changing this legislation in no way benefits me or anyone I know financially. I have come to Washington at considerable expense to myself, to my job, to my own family, for two reasons, justice and peace, justice on the high seas, justice in the law which you and you alone have the power to grant, justice for all those who sail across the high seas, and peace, ultimately peace for Judith.

I implore you, I beg you, pass this new DOHSA legislation and grant justice and peace to all those who cross the high seas, for my slain family, peace for some of the horrors that haunt Judith to this day.

[The prepared statement of Mr. Sleavin follows:]

PREPARED STATEMENT OF JOHN SLEAVIN, PORTLAND, OR

Senators I want to thank you for letting me testify before you. I especially want to thank Senator Wyden for bringing my plea for justice to the Committee's attention and Chairman Hutchison and Chairman McCain for inviting me to testify today. I ask that the Committee print my entire written statement in the hearing record.

It is a great honor to be here and to be heard by you. I have come here as a private citizen representing my family both alive and dead. I have not come here representing an interest group. No one I know will benefit financially from changing the DOSHA law. I have come at my own expense to Washington. And for what? I have come for justice. I have come for peace. It may sound trite but it is true, as is my cause. I have come to make sure that you see to it that there is justice on the High Seas and to bring peace to me, my family, all of those who cross the High Seas, and peace to Judith my devastated sister-in-law.

I will relate to you the last hours of my brother Mike, my niece Annie Rose, and my nephew Benjamin, and the horror that follows my sister-in-law Judith to this day. And if this is not enough, I will let you know the injustice of DOSHA as it is written today. Leaving in your hands, the ability to bring justice to the High Seas. To bring justice and peace to all who cross the High Seas.

The following is from depositions of Judith Sleavin and the Korean freighter personal:

A. MELINDA LEE—PRIOR TO COLLISION

On November 16, 1995, the yacht *Melinda Lee* departed from Nuku'alofa, Tonga, for a passage to the Bay of Islands, New Zealand. The *Melinda Lee*, a 47-foot Compass sailing yacht, was owned by Mike and Judith Sleavin. They were accompanied by their two children, Benjamin Timon Sleavin, age 9, and Annie Rose Sleavin, age 7.

My brother and his family had began their long-planned voyage on the *Melinda Lee* from the Port of San Diego on March 1, 1993. In November 1995, after 33 months of sailing, they were planning the crossing to New Zealand. The voyage between Nuku'alofa, Tonga, and the Bay of Islands, New Zealand, is approximately one thousand miles. They had estimated the voyage would take about seven days.

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The *Melinda Lee* was equipped with up-to-date navigation and safety equipment. This included (1) a collision avoidance radar detector ("CARD") mounted on the stern structure, which produced a loud piercing alarm in response to a radar (microwave pulses) from another vessel; (2) a Firdell Blipper Radar reflector, mounted approximately 30–35 feet above the deck on the mast, which increased the size and ease of detection of the *Melinda Lee* by a vessel using radar; (3) four auxiliary boats consisting of a six-person, Goodyear inflatable life raft equipped with survival gear and provisions, an eight-foot sailing dinghy, and a seven-foot Avon inflatable dinghy, and an 11-foot ABS inflatable dinghy with a hard bottom; (4) three VHF radios, two of which were on 24 hours monitoring emergency Channel 16; (5) navigational lights consisting on a tri-color light (red, green sidelights and white aft) on the 55-foot mast head, and a white light mounted on the transom and red/green lights at the deck level just aft of the bow; (6) an "abandon ship" bag with emergency supplies and equipment; (7) Furuno 1600 Radar; and (8) seven foam-type and four inflatable personal flotation devices ("PFD"). My brother was nothing if not fanatical about safety.

They had been waiting at Nuku'alofa, as part of a group of 28 yachts, for favorable weather conditions before commencing the voyage to New Zealand. The *Melinda Lee* sailed from Tonga on November 16, 1995. During the voyage, at various times, it traveled in the company of several other yachts. The greup of yachts maintained radio contact when all yachts checked in at specific times of the day. In addition, Mike and Judith were also in radio contact with three other boats several times a day.

On the morning of November 23, 1995, the *Melinda Lee*'s estimated time of arrival at the Bay of Islands, New Zealand, was 6:00 a.m. November 24. That morning the wind was from the northeast quadrant at 25 mph, with gusts less than 35 mph, and the sea was 8 to 12 feet. During the day of November 23, the sea conditions were moderate. The *Melinda Lee* was sailing comfortably, utilizing only a staysail.

After dinner, on the evening of November 23, 1995, Mike assumed watch in the cockpit of the *Melinda Lee* between 8:00 and 9:00 p.m. Both Annie and Benjamin had already gone to bed and Judith attempted to get some sleep. By late evening of November 23 the sea and wind conditions had worsened slightly, and there was intermittent light rain.

Judith was scheduled to relieve Mike from 0100 to 0300 on November 24. Prior to taking over the watch, she obtained the *Melinda Lee*'s G.P.S. (Global Positioning Systems) position, its speed (6½ knots), and confirmed the course at 195 magnetic. Judith determined that the position of the *Melinda Lee* was a little west of the rhumb line and headed directly to their waypoint. She then dressed to take her place in the cockpit. Her protective outfit included fleece pants and a fleece sweatshirt, foul-weather overalls, jacket, and a wool hat. Before she assumed her station in the cockpit, she put on her harness/personal flotation device which was already tethered to the vessel.

Before taking over the watch at 0100, Judith and Mike discussed sea conditions. After Judith assumed the watch, Mike descended the companionway and went to bed in the off-watch bunk, located on the port side adjacent to the left companionway ladder.

Between 0100 and 0200, Judith made complete 360 observations of the horizon every 15 minutes. These observations were made from the cockpit. She would also repeatedly scan the horizon whether sitting or moving about the cockpit. There was a VHF radio located on the cockpit and one at the navigation station below, both of which were audible to everyone on the *Melinda Lee*.

Between 0100 and 0200, Judith estimated that the visibility was approximately four to seven miles. She would have seen any navigational lights as far as seven miles away with her naked eye.

When her 15 minute wrist watch alarm sounded at 0200 on November 24, 1995, she followed her 360 observation routine, "only slower". When approaching landfall, consistent with good practices and in accordance with maritime law, hourly she went below to the navigation station to obtain the position of the *Melinda Lee* on the G.P.S. and then return quickly to the cockpit. She was particularly careful in her observations because she ". . . wanted to be really exact to make sure there were no dangers when I went down below." Judith spent close to 5 minutes scanning the horizon.

### B. M/V PAN GRACE—NOVEMBER 24 1995, BETWEEN 0000–0230

*(1.) Assuming of 0000—0400 Watch by Second Mate*

On November 23, 1995, at 0915, the M/V *Pan Grace*, a 540-foot long bulk carrier, loaded with logs, departed from the Port of Tauranga, New Zealand, en route to In-

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chon, Korea. As the vessel sailed northbound en route to Korea, the sea and weather conditions worsened during the 2000 to 2400 watch. The Second Mate, Sang Yun Han, took over the 0000–0400 bridge watch from the Third Mate at 2345 November 23. When he assumed the watch, the "visibility was restricted." It was raining "on and off," and foggy.

Mr. Han testified the Automatic Radar Plogging Aid ("ARPA") had not been turned on between 0000–0200 on November 24. ARPA, in conjunction with the *Pan Grace*'s main radar, (a.) provided automated long range scanning; (b.) sounded an alarm when another vessel was within a predetermined distance ("guard ring") from the *Pan Grace* or became a dangerous target; (c.) calculated the speed and bearing of another vessel; and (d.) automatically calculated a sufficient course alteration to avoid collision. Although 72 COLREGS, Rule 7 requires the use of all available means, including the use of ARPA, to determine if a risk of collision exists, Mr. Han saw fit not to turn on this available aid to navigation. ARPA's use is especially crucial when poor visibility or adverse sea and weather conditions exist.

*(2.) Spotting of Red Light (Melinda Lee)*

At some time between 0130 and 0200 on November 24, the Helmsman advised Han that he saw a dim light to starboard. In a statement to the Inchon District Maritime Investigation Office, the Helmsman said that he did not ". . . [know] the distance, but it was a dim red light." In a later statement of facts taken by the Korean Marine Surveyors on February 2, 1996, he again states that he ". . . observed a dimmed red light [which] appeared and disappeared soon in the relative direction of 1½ o'clock which was reported to the Second Mate who was the officer on watch." Upon being informed of the red light, Mr. Han stationed himself at a forward starboard window, located 3–4 feet from the door to the starboard wing of the bridge.

Mr. Han estimates that the red light was located 30 to 40 degrees starboard of the bow. He recognized that the red light meant he was observing the port side of a crossing vessel from the *Pan Grace*'s starboard side, and that the *Pan Grace* was in a "give-away" vessel under the COLREGS regulations. Under Rule 15, he was required to take the necessary action to avoid the *Melinda Lee*, the "stand-on" or privileged vessel, in a crossing situation. Although Mr. Han was unable to target the "red light" vessel on radar, he made no attempt to reach the *Melinda Lee* over Channel 16 of the bridge's VHF radio to determine its course, intentions, or to notify the *Melinda Lee* of the approach of the *Pan Grace*.

Mr. Han gave the Helmsman a rudder angle order to turn the vessel 10 degrees starboard.

Prior to allegedly ordering the Helmsman to make the 10 degree rudder angle change to avoid the collision, Mr. Han had made no calculations to determine whether a 10 degree rudder change to starboard was sufficient: "It is purely up to the watch keeping officer's own judgement." Mr. Han did not sound the ship's whistle or initiate any light signal or radio the *Melinda Lee* over VHF.

*(3.) Disappearance of the Melinda Lee*

Mr. Han saw the "[*Melinda Lee*] . . . with [his] naked eye while the vessel was turning." The last time Mr. Han ". . . saw the red light [was] at the bow slightly to the starboard." Mr. Han "thought that the vessel probably passed the port side but never saw a red light on the port side of the M/V *Pan Grace*. He could not see the bow of the *Pan Grace* while looking forward because large cargo cranes created a "blind section," and blocked his view.

After the *Melinda Lee* disappeared in front of the bow, Mr. Han finally went out on the port wing. He did not take his binoculars with him and only stayed out on the port wing "a matter of moments." Mr. Han only looked forward and not to the rear and was not able to observe any red light from the port wing of the bridge. At that point, Mr. Han ". . . just took for granted that it passed by." Mr. Han ". . . didn't think about the location of the red light. [He] only assumed that it is somewhere on the left side . . . [and he had] no reason to doubt."

Mr. Han made no attempt to locate the *Melinda Lee* with the vessel's search light, no broadcast was made to vessels in the vicinity on emergency Channel 16; and he allegedly did not call the Captain in accordance with Standing Order No. 20. Mr. Han had "no doubt at all" as to whether the *Pan Grace* had collided with the *Melinda Lee*. "Nor was there any reason to go back to the point where the red light vessel disappeared in front of the bow."

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C. DESTRUCTION AND SINKING OF THE MELINDA LEE; DEATHS OF ANNIE, BENJAMIN AND MICHAEL SLEAVIN

*(1.) The Collision*

After completing her observations for navigation lights after 0200, Judith went below, removed her tethered PFD, and then proceeded to the navigation station. She obtained the G.P.S. reading, plotted the position of the *Melinda Lee* on the chart and found that they were approximately 1½ miles from the rhumb line. There were 28 miles until the vessel reached its waypoint. The wave height was now 8 to 12 feet, winds were from the northeast quadrant, just aft of the port beam. The vessel was sailing easily with staysail and holding true to the course of 195 magnetic. Judith promptly made the log entries, got up, and proceeded towards the companionway ladder to get her harness. Before she reached her PFD and harness, she heard "three loud booms." After the booms, she immediately felt a hard blow to the back of her right ear and was pushed down. The inside of the cabin immediately filled with a rush of sea water mixed with diesel oil. Judith recalls opening her eyes, realizing that she was submerged in water. She looked up and saw a few bubbles of air at the ceiling and about a 12x12 inch piece of teak bobbing and floating over her head. The hatch above her, in the galley, was gone and the main companionway hatch was also sheared off. She swam up through diesel, water and debris to the now open hatchway.

When Judith reached the deck, forward of the cockpit, the *Melinda Lee* was 4 inches under water. Mike and Annie Rose were on the deck but Benjamin was not. The *Melinda Lee* was going down rapidly. The mast, rigging, hatch covers, seven-foot Avon, eight-foot dinghy, and most critically the Goodyear life raft and cradle had been sheared from the deck. All that remained was the half-inflated 11-foot ABS hard bottomed inflatable dinghy, which was in the water on the starboard side of the *Melinda Lee*, attached by a painter secured to a U-bolt.

When Judith got on deck, Mike ordered her to get into the dinghy with Annie and said ". . . I'll go get Benjamin." The *Melinda Lee* was rapidly submerging. Judith frantically told Mike that he would ". . . not be able to see through all the diesel and . . . debris," and that he would become trapped in the cabin, ". . . and I'll lose you both." Judith and Annie Rose got into the dinghy. The deck of the *Melinda Lee* was now beneath 15 inches of water, the cabin was filled with water, diesel and debris, and the vessel was sinking quickly; Mike realized that an attempt to rescue Benjamin was futile, and that Benjamin was trapped in the sinking vessel. Mike swam to the dinghy. Annie became hysterical over Benjamin. Then suddenly the *Melinda Lee* started going down really fast and the dinghy was being pulled down with it because it was still attached. They were all screaming with terror and then the painter parted from its shackle and the dinghy came popping up to the surface.

At about 0220, Mike said "there is the ship" which rammed them. It was turning starboard. There were no visible navigation lights on the vessel, no red or green sidelight, masthead or stern lights. Judith was able to see three rows of white lights which were not navigation lights. She estimated that the vessel was a couple of hundred feet away and moving quickly. The area around the *Melinda Lee* had become becalmed by the diesel oil on the surface which had escaped from the vessel's ruptured diesel tank. All the emergency provisions were in the Goodyear life raft and there had been no chance to get to the abandon ship bag. Both Mike and Annie Rose, who were dressed only in their sleep wear, had swum for their lives from the flooded cabin. They were now 50 miles from shore in the cold southern ocean.

*(2.) Return of the Pan Grace*

Within 10 minutes after the *Pan Grace* left the scene of the collision, the dinghy flipped in the heavy seas and the family all fell into the sea. After Mike and Judith righted the dinghy and helped Annie Rose in, the dinghy flipped a second time, and then a third time. After righting the dinghy a third time, the *Pan Grace* appeared in close proximity to the dinghy:

> Then all of the sudden there was rows of lights again, but this time there were faces. Mike and I and Annie stood up in the dinghy . . . and we yelled as loud as we could, "help us, save us, don't leave, help us" and they just kept going. They never slowed down. They came within 75 feet—50 to 100 feet of us, and they just left us to die.

When the lights of the *Pan Grace* had come into view this second time within 50–100 feet, Judith observed approximately three rows of lights. The vessel circled around the dinghy, from port to starboard. As the vessel passed, my family was able to see light complected faces, with very dark short hair at these rows of lights. When the *Pan Grace* sailed by, the dinghy flipped again a fourth time. To prevent

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this from reoccurring, the family were forced to sit on the hard bottom of the overturned dinghy.

*(3.) Michael, Judith and Annie Rose—Abandoned and Adrift*

After a short time, the remaining members of the Sleavin family became very cold. Judith took off her jacket and gave it to Annie Rose. Mike began shivering from the cold but refused to wear Judith's overalls telling her: "If you give me the overalls, we will all die. This way at least you have a chance." It became progressively colder, and it was apparent to Judith that Mike was suffering from hypothermia. Annie Rose was trying to keep Mike talking, but he was becoming delusional. Judith and Annie Rose tried to remain positive and talked about being rescued. When the sun rose, they could see landfall in the distance. That morning they were experiencing swells over ten feet in height. Judith and Annie Rose kept talking to Michael even though he did not respond. By this time, they could see sailboats close to land and what appeared to be the entrance to Opua, the New Zealand Bay of Islands. The dinghy appeared to be drifting closer to land. The waves, however, were getting larger.

*(4.) Death by Drowning of Michael and Annie Rose*

During the morning of November 24, suddenly a ". . . big wave comes out of nowhere, and our dinghy is coming up and up and up, and then [the wave] curls and crushes on us, and we all just went in three different directions," thrown off the dinghy. Annie Rose came up on one side of the dinghy, on the high side of the wave. Judith came up on the low side of the wave, and Mike was off in the distance. Annie started floating past Mike. "Mike said, 'I'll get Annie. You get the dinghy" . . . And when I got the dinghy, I could hear Annie screaming "Mommy, mommy, mommy, come save me." At that point,

> I grabbed onto the dinghy, and then I looked at her. "Mommy, mommy," and then she started choking on water, and her face went down, and her hands and legs went out, and she was floating face down. And Mike was with her, and I screamed from my gut like I never screamed before. And Mike and I were probably 50 feet away maybe 75 feet away . . . and he was holding onto Annie's arm, and he looked at me, and I looked at him and he waved . . . Mike was waving good-bye. As soon as Annie died, he didn't just wave good-bye. We just stared at each others eyes for the longest time and then he waved . . . [He then] went straight down. For several hours after that, I watched Annie's red jacket floating on the surface and getting smaller and smaller and smaller . . .

Annie Rose and Mike died somewhere between 1025 and 1045 on the morning of November 24, approximately eight and a half hours after the *Melinda Lee* was rammed by the *Pan Grace*. There would have been more than adequate time for New Zealand coastal search and rescue, and other ships, to come to their aid had the *Pan Grace* notified New Zealand authorities of the disappearance of a vessel in front of its bow. This could have occurred in spite of the failure of the M/V *Pan Grace* to stand-by and rescue, if only the vessel had broadcast the disappearance over Channel 16 and notified the New Zealand search and rescue agency.

*(5.) The next Fifty-Four Hours of Terror Before Rescue*

Judith sat on the dinghy crying, attempting to remain awake. She was extremely cold, shivering, was without food or water, and was becoming hypothermic. The seas continued to worsen, and there were waves over 20 feet. The swells had wave-like curls. The dinghy and Judith were covered with countless jellyfish. An Albatross followed the dinghy and tried to peck one of its inflated tubes. During the daylight hours on November 24, the current pushed the dinghy toward landfall, but on the night of the 24th, it was pushed farther out to sea. During the night of the 24th, Judith could see the lights of sailboats miles away, which she though were part of the Tonga group. She kept screaming but the boats were too far away to hear her.

When the sun rose on November 25, the current had again pushed the dinghy close to land. Judith was experiencing mental and physical deterioration. She observed that the approaching landfall had steep cliffs protected by rocks and pounding surf. With whatever strength she had left, she managed to point the dinghy toward a small beach, which was also partially surrounded by rocky outgrowths. As the incoming surf pushed the dinghy toward the beach, it became caught on top of a large partially submerged rock covered with the sharp shells of marine organisms.

By this point, Judith was experiencing excruciating pain in her back and she lacked any feeling below her waist. With great difficulty, and holding on to the dinghy, she managed to paddle slowly towards the small beach. She finally reached a steep bank below the beach, which was being pounded by the surf. This bank, too, was covered with sharp gravel and rocks. It took Judith approximately two hours

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to pull herself up the bank, while being struck and repeatedly pulled down by the crashing surf.

By the time she reached the beach, it was 8:15 p.m. on November 25. She had spent a total of approximately 42 hours on the open sea from the time the *Melinda Lee* sank. She was very wet, cold, shivering, and smelled of diesel. After partially wringing out her clothes, she fell asleep. Finally on November 26, at 4:00 p.m., she was spotted by a plane after 62 hours without food or water. Twenty minutes later, two power boats approached, and a dinghy brought two men to the beach. She was given a cup of water, and started to cry uncontrollably when asked about her family. She was unable to move her lower body, and a rescue helicopter was needed to transport her to Whangarei Base Hospital in Whangarei, New Zealand. She was keep for over a month in the Whangarei hospital

To this day Judith still has flash backs. She will be sitting in her room and then for hours her dead daughter and husband are floating face down in the carpet in front of her. She has head injuries which have left her disabled. She has extreme attacks of anxiety and is on sedatives. I could go on and on about the horror of the past two and a half years for Judith. A horror that is not likely to end any time soon.

And for all of this, The Korean ship that failed to give way; the Korean ship that was not using its avoidance radar as required; the Korean ship that returned to my family floating in the open ocean, and then abandoned them; the Korean ship that did not even radio anyone to start a search and rescue mission. All of this and what does DOSHA, a 1923 maritime law say:

> That the Koreans only have to pay for the value of the *Melinda Lee* and the future life time earnings of my brother. They got to kill my nephew and niece for free. If they would have been lucky enough to have Judith die at sea as well they would have only had to pay for the value of the *Melinda Lee*. That is assuming that they would have been caught.

The only court that can prosecute the Koreans for criminal acts is a Korean court. So far (two and a half years later) They have failed to do anything. DOSHA, which applies in US courts, does not allow for any punitive damages for what the Koreans did. In fact it is cheaper to make sure everyone dies the way DOSHA stands today. And I ask you senators, men and women of this great institution of the people of America called the US Congress, Is this justice? Did you come to Washington to allow these type of laws to stay as they are, laws that are good for Korean Freighters at the cost of American children's life.

Changing this legislation in no way stands to benefit me or anyone I know. I have come to Washington at considerable expense to myself, to my job, and my own family for two reasons and two reasons only. JUSTICE and PEACE. Justice on the High Seas. Justice in the law. Justice which you and you alone have the power to grant. And I have come for Peace. Peace of mind knowing that I am seeking justice. Peace and safety that you have the power to grant to the America people crossing the High Seas. The people that have sent you here. And ultimately Peace for Judith.

I implore you, I beg you, pass this DOSHA legislation and grant justice and peace to all those crossing the High Seas. Justice for my slain family. Peace for some of the horror that haunts Judith to this day.

Senator HUTCHISON. Thank you, Mr. Sleavin. That was touching testimony. We have a vote in progress, and I did not want to interrupt you because I certainly know that you have suffered a lot, and you have given up a lot to be here. However, we have 7 minutes left before we have to go to the vote.

Now, the question is, would you be able to wait for us to come back, or if not, I could go and vote and let you stay, then you could go and vote and we could keep going, or if you can keep your testimony within 3 minutes and you can't come back, then we could try to quickly finish the hearing. I am willing to do what is best for the other two witnesses.

Mr. HOFMANN. Senator, for myself I can wait, and I would like to address as many of the subcommittee as possible. I think that what Mr. Sleavin's testimony has highlighted was so well articulated. Since I am an attorney who practices maritime law I would like to address some of the more technical parts of what he said, and would like not to be hurried, if it is OK with you.

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Senator HUTCHISON. Mr. Danoff.

Mr. DANOFF. I, too, could wait, and would prefer to do so.

Senator HUTCHISON. OK. We will go and vote, and are you able to return?

Senator WYDEN. Yes.

Senator HUTCHISON. We will go and vote. I would say it will be 10 to 15 minutes for us to get over there and back, and then if you could look at your testimony and hold it to 4 minutes each, and then we will ask questions, and we ought to be able to finish up by 5:30-ish.

Thank you. We will be in recess.

[Recess.]

Senator HUTCHISON. Thank you for waiting.

Mr. Paul Hofmann, who is with the firm of Capiello, Hofmann and Katz in New York.

## STATEMENT OF PAUL HOFMANN, CAPIELLO, HOFMANN AND KATZ, NEW YORK, NY

Mr. HOFMANN. Thank you, Senator Hutchison and Senator Wyden for allowing me to address this honorable subcommittee. It is a great honor to do so and to be able to express the concerns of the many people that in my practice I represent. I am a maritime attorney. I have been practicing for over 16 years now, primarily representing people involved in accidents at sea, injuries, and to a certain extent some wrongful deaths.

Over the years, it has become clearly evident to us maritime practitioners, particularly who represent the plaintiffs or claimants, that DOHSA, the Death on the High Seas Act, is woefully inadequate in the remedies it provides. I think that now, certainly, these hearings show that Members of Congress have also become aware of this problem.

Of course, the thing that enlightened people about the woeful effects of DOHSA was the unfortunate accident involving the TWA 800. That enlightened the public (and certainly the public is attempting to enlighten their legislators) about how DOHSA, with its limitations on pecuniary losses, really does not compensate people for the real losses that a family suffers. I think that this is a bipartisan issue and I think it is a family issue.

We have a situation where a family is much more than simply the money support that one person provides to another within the family unit. A family is about the love and support that each one gives to each other. We have children in order to enjoy their life and their growing. We love our parents and we enjoy the comfort and society that they provide us. Under the Death on the High Seas Act, unfortunately, as it presently stands, these things are not compensable.

While the incident that occurred to TWA 800 occurred, I was handling a wrongful death case involving a fishing boat that was run down, we believe—well, it sank for one of several reasons, and it was kind of startling to listen to Mr. Sleavin's testimony because one of the alternative theories that we believe led to the sinking of the *Terri Lei* was that it, too, was run down by a foreign cargo ship. My client was an elderly mother of a 37-year-old fisherman aboard that vessel who we know became trapped inside the hull,

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probably lived for a period of time while the air supply finally exhausted itself and the boat sank and he died.

I come before this subcommittee to request that you consider and rethink S. 943, the proposal that's presently before you. The present proposal would create an exception to the application of the Death on the High Seas Act for those victims of airplane accidents that would be covered by DOHSA. That is, an accident that occurs more than one marine league, or 3 miles, off the coast of the United States.

There is no justification, no logic, no reason to exclude from DOHSA those victims but not also include in any exemption or any amendment those people who die in vessels, boats, ships, or on the sea. It is a sad situation that was explained by Mr. Sleavin and his family, and I ask the subcommittee to consider that when you have a death—a death is a death, and there is no reason to make a distinction between those people who die in airplanes or boats.

I have attached to my written statement, which I ask that you make a part of the record, a proposal that would help ameliorate the harmful effects of DOHSA, and that would include a straightforward, clear and simple change to the law. My suggestion provides that survivors of victims of wrongful death covered by the Death on the High Seas Act would be allowed the recovery of certain accepted remedies that we in the court system and in the general society think are fair.

I would also point out to the subcommittee that I believe that the proposal that has been put forward would not for the most part provide the remedies, and the effect, that you really intend. Under the common law there is no remedy for wrongful death, so that portion of the proposal would be of no assistance, and applying State law for the most part would not provide any more remedies for the victims of wrongful death on the seas, because most State laws, or many State laws, are similar to what DOHSA presently provides.

I see that my time is up, but I would welcome any questions about this, and there are other technical matters I would certainly like to point out.

[The prepared statement of Mr. Hofmann follows:]

PREPARED STATEMENT OF PAUL HOFMANN, CAPIELLO, HOFMANN AND KATZ, NEW YORK, NY

To the Honorable Members of the Subcommittee:

It is a great honor to appear before this Subcommittee, and I thank you for the opportunity to express my views, and those held by many maritime practitioners, about the pending legislation that would affect wrongful death remedies for deaths at sea.

In my 16 years of practice, my focus primarily has been on helping persons injured, and the families of those who have lost loved ones, at sea. I come before this Subcommittee to ask that it re-think the various proposals for righting the wrongs caused by the Death on the High Seas Act, 46 U.S.C. § 761 et seq. ("DOHSA"), and to adopt the straight forward legislative proposal appended to my statement.

It is clear that Congress recognizes that DOHSA is unfair because of the statute's arbitrary restriction of wrongful death remedies to only the pecuniary losses suffered by dependant relatives. DOHSA fails to recognize that the benefit of the family structure goes beyond mere payment of bills. Families are about the love, affection, services and the society they share. These are recognized in main-stream tort law as being worthy of compensation when a loved one is killed through another's fault. Yet, DOHSA slams the door on a remedy for these losses.

The Senate is being asked to make a special exception to the application of DOHSA to benefit victims of airplane accidents. As I discuss later, it is discrimina-

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tory to create yet another class of wrongful death victim, by allowing certain remedies to airplane accident victims dying on the High Seas, while excluding from those rights the families of persons who die on ships and boats on the same waters.

In my view, furthermore, the proposals before Congress which would benefit victims of airplane accidents, although well-intentioned, will fail to provide the intended benefit because of confusion about how wrongful death laws, as found within federal statutory law, under maritime common law, and state statutory and common law, apply.

What I propose is a simple amendment to DOHSA itself, not an end-run around it which tinkers with jurisdiction and applicability, and which would create a hornet's nest of legal problems, so-called "litigation about litigation". When there is a problem, I feel, the best solution is to go to the heart of the difficulty, and fix it at the source.

To help elucidate my concerns, allow me to relate a true-life situation from a case I recently handled. Our firm represented the elderly mother of Joseph Waterhouse, a 37-year-old fisherman who shipped out on the fishing boat TERRI LEI. He joined the boat with his friend, Adam Randall, who was also the boat's captain. About one week into the voyage, they set their lines for the night. After a late night telephone call in which one of the crew stated that the weather was getting rough, nothing more was ever heard again from the vessel. Our investigation led to several theories about whose negligence caused the sinking. The first cause was that it negligently was run down by a foreign cargo ship which routinely made voyages to the United States through the fishing grounds where the TERRI LEI was working. We also believe that, in violation of Coast Guard regulations, no lookout was posted on the fishing boat who could have alerted the crew to the danger. The third act of negligence which explained the loss was that the vessel sank because its owner had welded a steel plate over a large "freeing port" on the vessel's deck, in violation of Coast Guard regulations and industry standards. A freeing port is an opening in the deck rail which allows water on deck, such as comes from crashing waves, to flow quickly off the deck in a storm. With a freeing port sealed off, water gets trapped, adding tremendous weight to the boat, and disrupting its stability. This makes it susceptible to uncontrolled rolling from the ocean waves, and eventual capsizing. On the TERRI LEI, this freeing port should never have been sealed.

No matter which of these reasons caused the loss of the TERRI LEI, the experts believe that the vessel capsized and trapped the crew within the hull, which became their dark, cold, steel coffin. As the boat flooded and sank, slowly, but inexorably, the air pocket inside evaporated, and the trapped men died.[1]

The family of Joe Waterhouse received few answers about what happened to him. And later, because of the restrictive effect of DOHSA, they received little solace, and almost no compensation, for the loss of their beloved son and brother.

Mr. Waterhouse was a loving son who regularly visited his mother, and provided her financial assistance. Joe had a 10 year old boy, over whom he doted and who he supported. Unfortunately, under DOHSA, the compensation which Joe Waterhouse's whole family could prove as pecuniary loss was limited to about $30,000. Under the prevailing interpretation of DOHSA, no other compensation could be obtained for his loss of life. Based on recent interpretations of DOHSA, furthermore, there would be no recovery even for his conscious pain and suffering before death.[2] . He must have endured an almost unimaginable fear and mental and physical torment in those last few minutes, but under DOHSA, and the general maritime law, this terrible torture goes uncompensated.

As to Joe's family, his son will never again be able to walk on the beach with his dad. He'll never speak to him on the phone to pass the time, ask his advice, or tell a joke. Joe's mother will never again be able to sit down across the table and chat with her son over Sunday dinner, or see all of her sons together again. But none of these intangible losses can be compensated under DOHSA.

Similarly, the families of the children and adults who died on TWA 800 are limited in what they can obtain in compensation for their horrendous tragedy. Thus, equity and fairness scream for a change to be made for the victims of all deaths at sea.

The TWA Flight 800 tragedy enlightened the public about the travesty of what several members of Congress have called the "antiquated 1920 maritime law", the

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[1] In the nationwide best-seller, THE PERFECT STORM, there is a reference to the sinking of the TERRI LEI. That book, about the untimely sinking of the fishing boat ANDREA GAIL in another storm in the Atlantic, notes the irony of how Adam Randall turned down a job on the ill-fated voyage of the ANDREA GAIL only six months before he joined the TERRI LEI.

[2] See, for instance, *Bickel* v. *Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) and *Froman* v. *Korean Air Lines*, 84 F.3d 446 (D.C. 1996).

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same statute which prevented Joe Waterhouse's family from just compensation, DOHSA.

The simple solution to benefit all victims of deaths at sea is to amend DOHSA to allow for fair recovery for both airplane accidents victims and those victims suffering vessel-related accidents. Merely singling out airplane accident victims for special treatment is an affront to those whose family loved ones died at sea in vessel accidents.

In 1920, when DOHSA was enacted to permit lawsuits on behalf of a limited category of survivors of decedents killed by tortious conduct occurring in maritime accidents more than three miles out at sea, it was a recognition by Congress that wrongful deaths at sea should be compensated. Supreme Court decisions subsequently held that this statute also applies to deaths resulting from airplane crashes on the High Seas, to the exclusion of all other laws, including state wrongful death laws. One purpose for applying this statute to airplane crashes was to have uniformity of recovery for wrongful deaths, without certain victims' families being more favorably compensated than others, based upon non-uniform state law.

But DOHSA limits the damages recoverable to the "pecuniary" loss sustained by the persons for whose benefit the suit is brought. It has been unanimously held that his or her survivors' grief or their loss of the society of the victim is not compensable. DOHSA also has been interpreted by many courts to prevent a victim's pre-death conscious pain and suffering from being compensated.

After the Flight 800 disaster, where the town of Mountrouge, PA was decimated by the loss to the sea of 16 members of a High-School French Club, the families of these children were astounded to learn that their childrens' lives had little compensable value because of the restrictions of DOHSA to pecuniary loss. Because children, typically, do not provide pecuniary support to their parents, the family suffers little or no "pecuniary" loss when their child's life is negligently snatched away. No compensation is allowed to the parents' for their loss of society of their children, and the children's estates are not entitled to recover for the victims' pre-death horror.

In an attempt to remedy this obvious unfairness, in 1997 the House of Representatives passed H.R. 2005 to amend Title 49, §40120(c) to exempt victims of airplane crashes from the woeful effects of DOHSA. In the Senate, Senator Spector of Pennsylvania introduced similar legislation, S.943.

The Senate bill defines a class of remedies available to covered aviation accidents, and by its restriction to those types of accidents, would exclude those victims of deaths on the seas involved in vessel related incidents. Thus, the Senate's proposed legislation would allow airplane crash victims to obtain greater remedies than would be allowed to victims of vessel-related accidents. The bill would create an indefensible "steerage class" of victims—those whose loved ones die in boating accidents. They would be denied the recoveries permitted to families of those who suffer the same deadly fate, but who were "fortuitous" enough to die while engaged in airplane travel. What if pieces of TWA 800 struck and sank a boat on the sea below killing a group of kids on a school outing? Why should the families of those in the plane be protected more so than the families of those on the boat? More fundamental, why should victims of an airplane crash on the High Seas be entitled to greater remedies than wrongful death victims of boating accidents in the same waters? Nothing can justify categorizing these unfortunate souls differently, yet the Senate bill, unless modified, would do just that.

Besides this fairness issue, the proposed legislation, in many instances, would not accomplish its intended philanthropic purposes. The legislation states that the remedy restrictions within DOHSA (limiting recovery to "pecuniary loss") shall not, with respect to covered aviation incidents, prevent recovery of any additional remedy available under common law or State law. Closer analysis, however, discloses that, in many instances, nothing would be added to the rights of victims because, under the common law, there is no wrongful death remedy. So this clause in the bill is of no consequence. Indeed, both state wrongful death laws, and DOHSA itself, were enacted because there was no remedy for wrongful death under the common law.[3] The only potential addition to the present law the bill would provide, therefore, would come from the entitlement to remedies under "State law". But many state laws are as restrictive as DOHSA. This is so, for instance, in New York, where wrongful death claims are limited to pecuniary loss, although the estate may recover for the pre-death conscious pain and suffering of the decedent. Since Flight

[3]The Supreme Court has recognized a maritime common law cause of action for wrongful death in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). The remedies available under this cause of action, however, are limited to those allowed by DOHSA. See, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). Thus, in all respects, the inclusion of remedies under "common law" in the Senate bill provides nothing of substance to the present state of the law.

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800 originated in New York, an argument will be made that New York law applies to all of the victims. If so, they are little better off than they would be under DOHSA.

The legislative proposal would also be unsatisfactory because victims from different states, suffering the same aviation wrongful death incident on the High Seas, would be treated differently, based only upon the happenstance of their citizenship. This would be grossly unfair. Some families might receive no compensation for the death of a loved one, because their state statute prohibits anything but pecuniary losses, while others would be generously compensated, as a result of a home state's law being more generous in compensating victims. This would be intolerable, unreasonable and unnecessary.

The solution to all of these issues is for Congress to pass a uniform, fair DOHSA amendment, directly stating those remedies it determines are appropriate, and applying it to victims of all accidents on the High Seas.

The compromise I suggest has the support of both maritime labor[4] and many other sections of the maritime community. The traveling public deserves the protections this proposal will provide.

To do away with the inequities described above, to truly provide fair and just compensation, and to retain uniformity in applicable remedies to all victims, irrespective of residence, Congress simply should amend DOHSA to provide for the survivors of victims of any wrongful death occurring on the High Seas to recover non-pecuniary damages, including damages for loss of society and survivor's grief, as well as allowing the estate of the victim to recover for the decedent's conscious pain and suffering. The attached proposed amendment to DOHSA would accomplish this in a straightforward manner.

Thank you for allowing me to address this distinguished subcommittee.

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ATTACHMENT A.—PROPOSED AMENDMENTS TO DEATH ON THE HIGH SEAS ACT

46 USC §–762 is hereby amended as follows:

§ 762. AMOUNT AND APPORTIONMENT OF RECOVERY

The recovery in such suit shall be a fair and just compensation for the **[pecuniary]** loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

*In all claims for wrongful death arising within the maritime jurisdiction, including covered aviation accidents, whether asserted under common law, General Maritime law or federal statute, in addition to recovery of pecuniary losses, surviving relatives of the decedent may recover for loss of the decedent's society where such losses are proven. The estate of the decedent shall also have claims for the pain and suffering of the decedent prior to death, his/her emotional suffering in contemplation of impending death, medical expenses resulting from the injury and reasonable funeral expenses.*

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ATTACHMENT B

AFL–CIO MARITIME COMMITTEE,
*Washington, DC November 6, 1997.*

Hon. JOHN MCCAIN, *Chairman,*
*Commerce, Science, and Transportation Committee,*
*U.S. Senate, Washington, DC.*

DEAR SENATOR MCCAIN: We respectfully request that the attached statement of the maritime unions be made a part of the record of the the hearing held on October 29, 1997, on S. 943, a bill to clarify the application of the Act known as "Death on the High Seas Act" to aviation accidents.

Thank you.

Respectfully,

RENÉ LIOEANJIE,
*Chairman.*

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[4] Annexed is a copy of a letter to Senator McCain from Rene Lioeanjie, Chairman of the AFL–CIO Maritime Committee, representing almost all of deep-sea labor unions. The Committee expresses its whole-hearted support for the proposal presented herewith.

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PREPARED STATEMENT OF THE AFL–CIO MARITIME COMMITTEE

On behalf of the American Radio Association, (ARA); District No. 1—PCD, MEBA, (MEBA); District No. 3, Radio-Electronics Officers' Union, (ROU); District No. 4—NMU/MEBA, (NMU); and the International Organization of Masters, Mates and Pilots, (MMP), representing merchant seamen on American-flag merchant ships, it is respectfully requested that the Senate agree to compromise language to S. 943 which would equitably amend the Death on the High Seas Act. 45 U.S.C. §761 et seq.

There presently is before the Senate amendments which would affect the application of what several Congressmen have called the "antiquated 1920 maritime law" known as the Death on the High Seas Act ("DOHSA").[1] This law has a particularly devastating effect on the families of seamen and other maritime workers killed at sea. These men and women, most of whom are working-class men and women, and to a great extent, minorities, are most frequently exposed to the risk of death on the high seas. It is requested that DOHSA be amended to allow for fair recovery for both airplane accident victims and those victims suffering vessel-related accidents, allowing all such victims the right to recover for their pre-death pain and suffering, and the decedent's family's loss of society and consortium.

The crash of TWA Flight 800 enlightened the public about the travesty of the effect of DOHSA. Because it restricts a family's tort recovery to its "pecuniary" loss, for many of those who die at sea, their lives, from a legal standpoint, are worth nothing, no matter how egregious the conduct leading to their deaths, because they did not provide "pecuniary" support to others. Thus, in the context of Flight 800, where the town of Montoursville, PA, was decimated by the loss to the sea of 16 members of a High School French Club, the families of these children were astounded to learn that their children's lives had little compensable value under DOHSA. This is so because children, typically, do not provide pecuniary support to their parents, the only recovery allowed under DOHSA. This statute prohibits compensation to the parents for their loss of society of their children, and the children's estates are not entitled to recover for the victims' pre-death horror.

DOHSA preempts all state wrongful death laws for incidents occurring on the High Seas, including deaths occurring from airplane accidents, and thus, those state laws allowing recovery of pre-death pain and suffering, and for loss of society, have no effect in a High Seas accident.

The effect of the Act has created an outcry to change it, but at present, only for those who die in airplane crashes! This is intolerable for the maritime workers we represent. They are much more at risk of being killed at sea than those in airplanes, and should be equally entitled to fair laws protecting them.

It is unfortunate that only a tragedy of the magnitude of TWA 800 can call to Congress' attention the insidious unfairness under which mariners have labored for the past 75 years. The Flight 800 passengers' deaths may not be in vain, however, if their tragedy enlightens Congress to finally provide maritime, blue-collar workers equal justice as is being contemplated for those sufficiently wealthy to be able to take intercontinental plane trips.

Last session, the House of Representatives passed H.R. 2005 which would amend Title 49, §40120(c). The amendment would exempt victims of airplane crashes from the above-described woeful effects of DOHSA. The Senate is urged to make a more thorough, logical change to the laws that effect the compensation remedies to persons dying on the High Seas, irrespective of whether the accident happened in an airplane crash or vessel sinking.

Illogically, the proposed legislation would allow airplane crash victims to obtain greater remedies than would be allowed to victims of vessel-related accidents. The bills would create an indefensible "steerage class" of victims—those whose loved ones die in beating accidents, who would be denied the recoveries of families of victims who suffer the same deadly fate, but who were "fortuitous" enough to die while engaged in airplane travel.

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[1] In 1920, Congress passed DOHSA to permit lawsuits on behalf of a limited category of survivors of decedents killed by tortious conduct occurring in maritime accidents more than three miles out at sea. Supreme Court decisions have held that this statute applies to deaths resulting from airplane crashes, to the exclusion of all other laws, including state wrongful death laws. One purpose for applying this statute to airplane crashes was to have uniformity of recovery for wrongful deaths, without certain victims' families being more favorably compensated than others, based upon nonuniform state law.

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We ask, what if TWA 800, as it crashed into the ocean, struck a cargo ship, killing the crew.[2] Why should the families of these in the plane be protected more so than the families of those on the vessel? There is no logical reason.

The ARA, MEBA, ROU, NMU, and MMP request that a substitute amendment be passed which directly changes the language of DOHSA, rather than attempting to finesse change through amending the statute's application. Furthermore, we ask that the amendments go further than those proposed in S. 943, which would only allow the benefit of "common law" or "state law" remedies to the persons affected by the amendments. The proposed legislation, in many instances, would not accomplish its intended philanthropic purposes. The legislation states that the remedies restrictions within DOHSA (limiting recovery to "pecuniary loss") shall not, with respect to covered aviation incidents, prevent any remedy under common law or State law. Under common law, however, there is no wrongful death remedy, which is why both state wrongful death laws, and DOHSA itself, were created. What is left, therefore, would be entitlement to remedies under state law. But many state laws are as restrictive as DOHSA. This is so, for instance, in New York, where wrongful death claims are limited to pecuniary loss, although the estate may recover for the pre-death conscious pain and suffering of the decedent. Since Flight 800 originated in New York, an argument will be made that New York law applies to all of the victims. If so, they are little better off than they would be under DOHSA.

Under the legislative proposals, victims of an incident who live in different states would also be treated differently, based upon their citizenship. This would also be grossly unfair. Some families might receive no compensation for the death of a loved one, because their state statute prohibits anything but pecuniary losses, while others would be generously compensated, because their state's law is more generous in compensating victims. This situation would be unreasonable and unnecessary. As an alternative, Congress should pass a uniform, fair DOHSA amendment.

To do away with the inequities described above, to truly provide fair and just compensation, and to retain uniformity in applicable remedies to all victims, irrespective of residence, Congress simply should amend DOHSA to provide for the survivors of victims of any wrongful death occurring on the High Seas to recover non-pecuniary damages, including damages for loss of society and survivor's grief, as well as allowing the estate of the victim to recover for the decedent's conscious pain and suffering.

To that end, we ask that Congress amend the laws of the United States in conformity with the proposed attachment.

PROPOSED AMENDMENTS TO DEATH ON THE HIGH SEAS ACT

46 U.S.C. § 762 is hereby amended as follows:

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

*In all claims for wrongful death arising within the maritime jurisdiction, including covered aviation accidents, whether asserted under common law, General Maritime law or federal statute, in addition to recovery of pecuniary losses, surviving relatives of the decedent may recover for loss of the decedent's society where such losses are proven. The estate of the decedent shall also have claims for the pain and suffering of the decedent prior to death, his/her emotional suffering in contemplation of impending death, medical expenses resulting from the injury and reasonable funeral expenses.*

Senator HUTCHISON. Thank you, Mr. Hofmann.

The last witness is Eric Danoff from Kaye, Rose and Partners in San Francisco.

## STATEMENT OF ERIC DANOFF, KAYE, ROSE AND PARTNERS, SAN FRANCISCO, CA

Mr. DANOFF. Madam Chairman, Senator Wyden, thank you for inviting me to address this complex, difficult, and emotional issue.

[2] Or a boatload of school kids on an outing, for that matter.

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I respectfully request that you include my written remarks in the record of this hearing.

Senator HUTCHISON. We will.

Mr. DANOFF. I have practiced maritime law for 23 years, and I have personally had to deal with the difficult issue of determining a fair remedy for accidental death on the high seas.

We all have sympathy for the family members and others affected by that death, and I certainly include Mr. Sleavin in that. Our job here is to look beyond the facts and emotion of particular incidents, however, and to form a fair and reasonable policy that fits all cases.

As we do that, we do not start with a completely clean slate. This issue is a difficult one, because what we are talking about is measuring the value of a human life, and we know that that is immeasurable. We know that that is infinite, and so somehow we have to come up with a policy of adjudication in such cases when we know we have an impossible task.

Other legislative bodies, including Congress, the States, and world legislatures, have addressed this same issue. The Congress has come to the conclusion through DOHSA, as well as the Jones Act which covers seamen, as well as the FELA, the Federal Employers Liability Act which covers railroad workers, and even in some cases the Federal Tort Claims Act, that the most fair and reasonable way to adjudicate these issues is to have definable pecuniary damages.

The same is true, as Mr. Hofmann has pointed out, in most of the States, at least in most particulars, and the same is true, as I will mention in a moment, of the world community.

Now, why is it that other legislative bodies, when faced with this same question, have determined that we need definable and limited damages? The reason is that you need consistent and predictable remedies, or it is simply unfair.

Let me mention an example of inconsistency that I think we all agree is unfair, where there is unlimited and unguided jury decision on damages. It is a real life example. It comes from the KAL tragedy, where the plane was shot down over Russia.

There was a 12-minute period between the time the plane was hit by the missile and the time it hit the ocean and everyone died. Everyone in that plane was similarly situated. Two courts allowed different juries to award pain and suffering damages to passengers in that case, exactly the same fear and pain and suffering circumstances for both individuals. In one case a jury awarded $100,000. In another case, a jury awarded $750,000 for that same 12-minute period, 7½ times as much.

Now, is it fair that two people so similarly situated should be treated so differently? I submit that it is not. When you have damages that are unlimited and undefined, you inherently get inconsistent awards, and that is unfair both to the claimants and to the people being sued.

The other hallmark, I think, of the reason why legislative bodies say pecuniary damages is the most fair remedy is predictability. I can tell you from personal experience that the worst thing that can happen in an accidental death case is a long-drawn-out litigation. What is by far the better resolution is a quick resolution of the

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case. That only happens where both sides have in mind some predictable amount that they know would be the end result.

Unlimited damages with no yardstick as to what the damages could be make it extremely difficult to settle these cases, and that does a great disservice both to the claimants and to the defendants.

The world community has one convention that deals with death at sea. Now, we have to remember in dealing with this issue that by definition we are talking about deaths outside the United States, more than 3 miles from shore, outside of our territorial limits. These are international incidents, and you do not have to be an American citizen to sue under DOHSA. You do not have to be an American citizen or corporation to be sued under DOHSA.

In those cases, the world community has decided through the Athens Convention, which deals with passengers, that a cap on damages is the fairest way to approach this. The reason they did so was the same reason why DOHSA works, which is that damages then become consistent and predictable. Without that, we have a very unfair, irrational system.

I would in closing say that rational minds certainly may differ about the value of any given case, but they would not differ that there has to be some consistency and some rationality and some predictability in whatever system is used to allow damages in these cases.

Thank you.

[The prepared statement of Mr. Danoff follows:]

PREPARED STATEMENT OF ERIC DANOFF, KAYE, ROSE AND PARTNERS, SAN FRANCISCO, CA

Mr. Chairman, Members of the Subcommittee, my name is Eric Danoff. I am an attorney with the law firm Kaye, Rose & Partners, which has offices in California and Florida. I have practiced maritime law for over 23 years, and have handled a number of cases involving death on the high seas. My work for the maritime industry primarily has focused on representing shipowners, ship operators, and their insurers. Therefore I am familiar with their views concerning the delicate balance needed for a fair remedy for death at sea. This Statement addresses proposals to amend the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §761–767. Proposed amendments to date include H.R. 2005 and S.943.

DOHSA provides for the recovery of pecuniary loss, in its broadest sense, for deaths at sea. This is a well-chosen remedy for maritime cases. To add non-pecuniary damages to DOHSA in the maritime context would be undesirable. To do so would make DOHSA by far the world's most liberal remedy scheme for death on the high seas. Not only would the U.S. be out of step with the rest of the world's maritime nations, but since DOHSA remedies are not limited to U.S. citizens, the U.S. would become the "courthouse for the world" for cases involving death at sea since claimants for non-U.S. decedents would have a powerful incentive to invoke our liberal jurisdiction. Also, the nebulous and subjective nature of non-pecuniary damages would make liability unpredictable and inconsistent, and thus would make cases harder to settle. Nor would such a change in DOHSA enhance safety aboard ships, since an expansion of liabilities under DOHSA would be an ineffective and unreliable tool for promoting safety on the high seas. In any event, Congressional action on this issue should await the decision of the Supreme Court in a pending case that may significantly impact the damages that are presently available under DOHSA in both the aviation and maritime contexts.

I. SUMMARY OF CURRENT DOHSA PROVISIONS

*A. Applicability of DOHSA*

DOHSA was enacted in 1920 to create a uniform cause of action for the death of persons caused by events at sea. The wrongful death laws of most states did not apply to torts arising outside the states' boundaries, and therefore a uniform federal remedy was needed. DOHSA allows recovery for any death caused by "wrongful act,

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neglect or default occurring on the high seas." Liability under DOHSA may be based upon a variety of legal theories, including negligence, unseaworthiness (if the decedent was a seaman), intentional conduct, or product liability.

The courts apply DOHSA broadly, to any death resulting from a maritime tort occurring anywhere in the world more than a marine league (three nautical miles) from a U.S. shore (regardless where the death ultimately occurs). DOHSA applies to all persons, including seamen, passengers, offshore workers, and shipboard visitors. To recover under DOHSA, neither the decedent nor the claimants need be U.S. citizens or residents.

The Jones Act, 46 U.S.C. App. §688, enacted in 1920 shortly after DOHSA, also provides a remedy for the death of seamen. Representatives of deceased seamen can sue under the Jones Act, DOHSA, or both.

Any person or entity causing a death at sea can be held liable under DOHSA. Also, any vessel on which a tort arises is liable in rem and can be arrested and seized to secure or satisfy a DOHSA claim or judgment. Defendants may include U.S. or non-U.S. shipowners and operators, whether the vessel is U.S. flag or foreign flag. The U.S. Government can be sued under DOHSA.

DOHSA does not apply to deaths caused by acts occurring within three miles of a U.S. shore. Within that three mile limit a cause of action for wrongful death can be alleged under the Jones Act (for seamen), the Longshore & Harbor Workers Compensation Act, 33 U.S.C. §901 et seq. (for non-seamen maritime workers), the general maritime law (for all persons), and state law.

*B. Who Can Recover Under DOHSA*

Section 761 of DOHSA provides that damages may be recovered by the decedent's wife, husband, parent, child, or any dependent relative. This delimitation of the class of persons entitled to recover death damages is not unusual. Virtually every state and federal wrongful death statute in some way limits the class of potential claimants.

*C. Damages Recoverable Under DOHSA*

Section 762 of DOHSA provides for the recovery of the "pecuniary loss" sustained by the decedent's beneficiaries. Pecuniary losses recoverable within the meaning of DOHSA §762 include:

1. Loss of support, which includes the financial contributions that the decedent would have made to the claimant had the decedent lived, usually measured by loss of the decedent's future income;
2. Loss of services, which means the monetary value of services (for instance, household services) that the decedent would have provided to the claimant, usually measured by the cost of paying someone to perform such tasks;
3. Loss of nurture, care, guidance, and instruction, which is designed to compensate a decedent's minor children for the intellectual, moral, and physical training that a parent confers. Loss of nurture damages are recoverable by adult children or others upon a showing of special need or circumstances;
4. Loss of inheritance, which compensates a claimant for the value of property that the decedent probably would have accumulated and which the claimant would have inherited;
5. Medical expenses for treatment of the decedent; and
6. Funeral expenses.

*D. Damages Not Recoverable Under DOHSA*

DOHSA prohibits the recovery of non-pecuniary (i.e., non-economic) damages, including punitive damages, survivors' grief, and loss of society or consortium. DOHSA does not expressly provide "survival" damages, which are damages allegedly sustained by the decedent during the time he or she survived after a tort but prior to death. Such damages can include, for example, pre-death pain and suffering of the decedent. The federal appellate courts are split on whether the general maritime law supplements DOHSA to provide survival remedies such as the decedent's pre-death pain and suffering. (This issue is presently before the U.S. Supreme Court, discussed below.)

*E. Jury Trials Under DOHSA*

A suit under DOHSA may be filed in either state court or federal court. Suit must be filed in federal court if the state's wrongful death statute does not apply to deaths at sea. An action in federal court that is filed solely under DOHSA is in admiralty, and therefore the plaintiff has no right to a jury trial. If a DOHSA claim is filed in state court, is brought in federal court but coupled with non-admiralty claims, or is brought in federal court under diversity jurisdiction, the entire case (including the DOHSA claim) may be tried to a jury.

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## II. COMMENTS ON POTENTIAL REVISIONS TO DOHSA

### *A. Amendments to DOHSA Should Await Decision Of A Pending U.S. Supreme Court Case That May Significantly Affect the Remedies Available For Death On the High Seas*

The U.S. Supreme Court is presently deciding the case *Dooley* v. *Korean Air Lines*, Supreme Court No. 97–704, reviewing 117 F.3d 1477 (D.C. Cir. 1997). That case involves the issue whether the general maritime law provides a cause of action for survival damages, in particular pre-death pain and suffering, as a supplement to DOHSA. The lower federal courts have split on this issue. Briefing to the Supreme Court has been completed. Oral argument of the case is set for April 27, 1998, and a decision can be expected within a few months. The decision may significantly affect the remedies available for death on the high seas, and it almost certainly will clarify what remedies are available. It makes little sense for Congress to act on possible amendments to DOHSA before the Supreme Court decides the case, for whatever is proposed now may need to be modified following the Court's decision, or may address a problem that will no longer exist.

### *B. Recovery of Pecuniary Damages Is an Appropriate Remedy for Deaths At Sea, and Amending DOHSA to Allow Non-Pecuniary Damages Would Result in Undesirable Consequences*

DOHSA allows recovery of all pecuniary damages arising from death, and the scope of such damages is broad. For instance, if the parent of a child dies, the child is entitled to recover not only the loss of support, but also a monetary award for loss of nurture, care, guidance, and instruction, which may be a significant amount.

To amend DOHSA to allow non-pecuniary death and survival damages, such as punitive damages and survivors' grief, would open a Pandora's box of undesirable consequences. These types of damages are nebulous and subjective. Because they are unpredictable in amount, they are difficult to plan for or insure. Indeed, punitive damages are in some states uninsurable. The unpredictability of such damages may make settlement of such claims difficult or impossible. In recognition of these problems, not only DOHSA but also other federal laws provide that pecuniary damages are the proper measure of recovery for death. For example, non-pecuniary damages for loss of society or survivors' grief are not recoverable under either the Federal Employer's Liability Act ("FELA"), 45 U.S.C. App. §§51–59, or the Jones Act, 45 U.S.C. App. §688, which incorporates FELA.

Punitive damages are particularly controversial. They are not intended to compensate injured persons, but are a form of punishment or retribution. The case against punitive damages has been made elsewhere. Suffice it to say for present purposes, many believe that punitive damages are random, excessive, non-compensatory to the recipient, and of no significant benefit in preventing casualties.

Pain, suffering, and grief damages have similar drawbacks. Juries are given little or no useful guidance as to what amounts are appropriate, resulting in widely varying and sometimes excessive awards, depending upon the emotional impact of the casualty. For example, some lower courts allowed juries to award pre-death pain and suffering damages to the estates of the deceased passengers on the KAL 007 flight that was shot down over Russia. (The Warsaw Convention limit did not apply because willful misconduct was found.) The elapsed time between the impact of the missile on the airplane and the time the airplane hit the water was about 12 minutes. One jury awarded $1,500,000 in pre-death pain and suffering damages for the death of a husband and wife. Another jury awarded $100,000 in pain and suffering damages for the death of another passenger on the same flight. This disparity in damages illustrates both the random nature and potential excessiveness of pain and suffering awards.

While pre-death pain and suffering damages may be compensatory to someone who experiences them, they are not compensatory to relatives of that decedent. Indeed, a number of states do not allow pre-death pain and suffering under their own laws. These states include Arizona, California, Colorado, Idaho, Indiana, Minnesota, Virginia, and Wyoming. Nor do most states allow the recovery of damages for survivors' grief. Some states place monetary caps on non-pecuniary wrongful death awards.

To amend DOHSA to include non-pecuniary damages by supplementing DOHSA with state law would create other problems. State laws vary as to what non-pecuniary wrongful death or survival damages are recoverable, and in what amounts. Therefore two similar deaths at sea may yield substantially different recoveries depending upon the state in which each action is filed. The inevitable result would be forum shopping for the state with the most liberal damages law or most generous juries. Since no particular state's law is likely to be obviously most appropriate to

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a death on the high seas, a shipowner defendant would have no way of knowing what liabilities to which it is subject, and may be subject to conflicting liabilities when multiple deaths arise out of the same casualty.

When DOHSA was enacted, it was expected to cover maritime deaths on the high seas. Trans-oceanic air flights were not contemplated. The impetus for amending DOHSA primarily has arisen from large aviation disasters involving the deaths of hundreds of U.S. citizens—KAL Flight 007 in 1983, Pan Am Flight 103/Lockerbie, and TWA Flight 800. No similar maritime casualties involving U.S. vessels or citizens have occurred, and no U.S. group affected by the maritime industry or potential maritime casualties has called for changes in DOHSA.

*C. Deaths on the High Seas Involve International, Not Purely Domestic, Considerations*

If DOHSA is amended to allow non-pecuniary damages, the U.S. would have the world's most liberal remedies for death on the high seas. Inevitably, the U.S. would become the "courthouse for the world" since claimants for non-U.S. decedents would have a powerful incentive to invoke our liberal jurisdiction and file lawsuits here for any death that has even the slightest U.S. contact. DOHSA applies to many cases that do not involve U.S. citizens or U.S. vessels. The scope of U.S. law and access to U.S. courts are broadly applied to foreign citizens and vessels. Since some states have laws that attempt to prohibit or limit dismissal of such cases for forum non conveniens (inconvenient forum), our courts may be forced to retain jurisdiction over cases with little U.S. connection. Our already overburdened court system could be subject to a large influx of wrongful death cases with minimal U.S. connections.

Deaths on the high seas often have international ramifications, so recognition of the legal and social norms of the international community is appropriate. By and large, DOHSA accomplishes that, whereas a proposed liberalization of remedies may not. For instance, other nations generally do not allow jury trials in civil tort cases, nor punitive damages, nor unlimited damages for non-pecuniary losses. The most widely accepted international treaty governing death on the high seas is the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea. Although the U.S. is not a signatory, such major maritime nations as the United Kingdom, Germany, Greece, Spain, Russia, and Argentina are. The Athens Convention contains a limit on damages for the death of a passenger on the high seas. DOHSA as presently constituted more closely parallels international standards of legal redress than would more extensive and unlimited non-pecuniary remedies.

*D. Ship Safety Should Be The Responsibility of Safety Professionals*

Seagoing vessels are currently required to meet detailed and comprehensive U.S. Coast Guard and International Maritime Organization (IMO) safety standards. Flag states, port states, and international ship classification societies closely monitor compliance with these safety regulations. The U.S. Coast Guard vigilantly enforces safety rules and regulations for all U.S. flag vessels and for all non-U.S. flag vessels that call at U.S. ports. For safety professionals like the Coast Guard to issue, implement, and enforce safety rules for ships is the best way to prevent accidents at sea. The tort system is an ineffective and unreliable tool for promoting safety aboard ships.

*E. DOHSA Should Retain Its Status As An Admiralty Action, To Be Tried To The Court Instead Of A Jury*

Since the founding of the United States, actions in admiralty have been tried to a judge, not to a jury. Unlike other casualties, deaths at sea rarely involve "local interests" affecting a local community. Further, maritime casualties tend to be complex and outside the understanding or experience of an average citizen juror. Such cases are more appropriately tried to a judge than to a jury. To subject DOHSA to state law remedies and juries would overturn this longstanding principle.

*F. If Amended, DOHSA Should Be Part Of An Overall Tort Reform Bill*

There is widespread belief that many aspects of the present tort system in the U.S., including excessive litigation involving foreign litigants, are in need of reform. Other issues under scrutiny generally by Congress include the availability of punitive damages, the frequently unpredictable and excessive awards by juries, and the amorphous standards for pain and suffering. It would make little sense to amend DOHSA without considering overall tort reform so that a comprehensive balance can be struck. Otherwise DOHSA cases may become subject to the same problems and abuses that many in Congress are trying to remedy in other legal areas.

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III. CONCLUSION

DOHSA as presently constituted more closely parallels international standards of legal redress than would a damages scheme that included unlimited non-pecuniary damages. Other nations generally do not allow unlimited damages, nor punitive damages, nor jury trials in civil tort cases. In the maritime context, adding non-pecuniary damages to DOHSA would be undesirable.

Thank you for the opportunity to present these views.

Senator HUTCHISON. I would like to ask you both, the attorneys, if you would like to speak to this, just on another technical point. And that is, did you have any opinion on the forum issue that is addressed in Senator Gorton's amendment, which would limit the forum to the place of the departure or arrival point? That would be the limitation of the forum rather than the plaintiff's home state, for instance.

Mr. DANOFF. Well, I certainly have a question as to its applicability to the maritime context. Because, for instance—and I do not mean to suggest anything other than this—even in the case that Mr. Sleavin is describing, I believe the ship went from one foreign port to another foreign port, and the yacht was going from one foreign port to another foreign port. So Senator Gorton's forum limitation is not really applicable.

This highlights the fact that DOHSA gets applied to so many cases that really do not involve the United States. And I think certainly some restriction on that would be an advance on the law, so that we are not deluged with cases which have only the most remote connection to the United States.

Mr. HOFFMAN. Senator, I am not fully familiar with the language of Senator Gorton's proposed amendment, but just hearing what you have to say and also what Mr. Danoff has said, one thing that I have noticed in his written testimony is his fear that the U.S. courts would somehow be thrown open to an invasion of foreign nationals bringing suits in the United States. And I think that is a red herring.

The U.S. Supreme Court, in the *Piper Aircraft* v. *Reyno* case, has clearly stated what the rules are for forum selection. And we also have the concept of forum non-conveniens, if the case does not belong in the U.S. courts because most of the contacts concerning the suit are to a foreign country, then the case will not be kept here in the United States. Thus, there is no reason to fear all these foreigners in our courts.

Also, as to the choice of law applied in a lawsuit, just because the Death on the High Seas Act exists does not mean that it is going to apply to a foreign national. Under the *Lauritzen* v. *Larsen* case, the choice of law has a defined set of parameters as to how it would be analyzed to determine which law applies.

As to why should a case be brought in a *state* or a locale based on where a plane took off or where the plane intended to be landed, I do not think that that is a fair criteria. Because, for instance, let us say a plane takes off from LaGuardia Airport in New York and is headed to somewhere in Canada or whatever, but it included 50 people that were from Pennsylvania and then a smattering of people from the rest of the States. Why should New York be the choice of law or choice of venue?

Senator HUTCHISON. Let me just ask you this. Addressing Mr. Danoff's testimony about the disparity in awards, do you think that

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having one forum that would handle all of the cases would make more sense? Or do you think the limitations would be such that that would not be a factor?

Mr. HOFFMAN. The issue of disparity in awards is also, to a certain extent, a red herring because of this: What we forget when we read the New York Post, or whatever newspaper, about the person who gets what seems to us might be an unreasonable award is they never report the fact that there is an appellate review process that looks at all of these awards, if they seem to be out of line, and determines what is fair, just and reasonable and whether a jury has gone beyond that. That is ingrained in our legal system, and it is a good part of our legal system. It does bring justice.

Simply because one jury may have seen a set of facts differently than another jury does not necessarily mean that that is where the final award is going to be. But also we do not know the factors. And I cannot analyze the two juries that made the determination that Mr. Danoff pointed out, because perhaps one of those people did not survive the entire 12 minutes, whereas the other one did. We do not know the facts. And just by saying here is a jury award that was this much and here is a jury award that was this much, look how unfair the disparity is, we do not know all the factors that went into it.

So I cannot comment other than to say that we trust our citizens to make these sort of determinations. Why should we take that right away from our citizens on the juries to make these decisions? What is fair and just and reasonable is something that citizens can make that determination. And we, and you particularly in Congress, in my opinion, with all due respect, should not be taking that away from our citizens. That is a constitutional right that should be upheld.

Senator HUTCHISON. Senator Wyden.

Senator WYDEN. Thank you, Madam Chair.

Let me begin by thanking you for your thoughtfulness to my constituent. You and your staff have just been terrific, in terms of working out arrangements for Mr. Sleavin to testify. And I want to express my thanks to you and also to the chair of our full committee, Senator McCain. Because both of you have been terrific to us. And we appreciate it.

Madam Chair, given the shortness of time, I would ask that the opening statement I had prepared be entered into the record in its entirety. And perhaps I could just pose a few questions to our witnesses.

Senator HUTCHISON. It will be included. And please go forward.

[The prepared statement of Senator Wyden follows:]

PREPARED STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Madame Chairman, I want to thank you for the courtesy that you and McCain and your respective staffs have extended to me and my fellow Oregonian, Mr. Sleavin, on this important matter.

Madame Chairman, it is high time for Congress to update the antiquated Death on the High Seas Act. The Death on the High Seas Act (DOHSA) was originally enacted in 1920 as a way to provide compensation to the widows and orphans of professional seafarers who perished at sea. The clear purpose of the law was to help victim's families, not to limit their recovery. But over the years, the DOHSA law has come to be interpreted in ways that limit or even prevent victim's recovery. It is no longer a means to help, and has become a major hindrance to those seeking

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just compensation for those who have lost family members in accidents more than three miles from shore.

DOHSA has been applied to situations well beyond the original focus of the law, which was professioral seafarers lost at sea, to now cover maritime accidents involving pleasure boaters and even passengers killed in commercial airline crashes. DOHSA creates an arbitrary distinction in the law between accidents that occur within three miles or beyond three miles from shore. For accidents within the three mile limit, one set of rules apply. For accidents outside the three mile limit, a completely different set of rules apply. It is hard to fathom how this arbitrary application of the law serves the interests of justice.

Senator Specter's bill, S. 943, would reform the law to eliminate this arbitrary rule, but only for airplane crashes. I agree with Senator Specter about the need to reform DOHSA. Specter's bill will provide justice for a number of my constituents—one of whom was a passenger on TWA 800 as well as the families of Oregon crew members of an Air Force Reserve C–130 aircraft that crashed off the Oregon coast.

But I think the reform needs to go further. Congress should comprehensively reform DOHSA. We should also eliminate the equally arbitrary distinction between maritime collisions that occur inside or outside the three mile limit. One of my constituents who is testifying before the Committee today, John Sleavin lost his brother, nephew and niece under horrible circumstances. The family's pleasure boat was sunk by a Korean freighter in international waters. The accident is especially tragic because after the collision, there was no attempt by the Korean vessel to rescue the family or even notify authorities about the collision. Mr. Sleavin's nephew was killed in the collision but his brother and his niece perished from drowning eight hours after the collision. The only survivor was the mother, Judith Sleavin, who suffered permanent injuries and is totally disabled. She somehow survived after 42 hours at sea and another 20 hours awaiting rescue on an uninhabited island.

This tragedy was not an act of nature or an unavoidable accident. The Sleavin family was destroyed by an act of human negilence. The operators of the Korean freighter violated at least seven international standards of maritime conduct that include: failure to maintain a proper look-out aboard their vessel, failure to maintain a safe speed, failure to evaluate the risk of collision, failure to keep out of the way of a vessel, failure to take early and appropriate action to avoid collision, and failure to follow basic tenets of prudent seamanship.

So, what do we do in a case like this when a foreign vessel repeatedly and flagrantly failed to comply with international safety and navigation regulations? Some might say that we should leave it to the safety professionals but clearly this is ineffectual in the Sleavin's case. In fact, it appears the Korean officials may have engaged in a coverup of negligent and criminal actions. What do we say to Mrs. Sleavin? Can we seriously argue that she or other US citizens can rely on Korean authorities to enforcesafety standards.

Under DOHSA, Mrs. Sleavin is limited in her ability to recover damages to pecuniary (monetary) losses. Also, she can recover nothing at all for the loss of her minor children. As written, S. 943 does nothing to change Mrs. Sleavin's ability to recover for the wrongful death of her husband and children. Mr. Sleavin's testimony is compelling evidence why we need comprehensive reform of DOHSA to provide equal justice to all our citizens. I intend to do whatever it takes to bring justice to the Sleavins and protect all US citizens who sail on the high seas.

I very much appreciate Senator Hutchison holding this hearing and inviting Mr. Sleavin to testify.

Senator WYDEN. Thank you, Madam Chair.

And, first, Mr. Sleavin, let me again express my sympathies to you and to your family for all that you have gone through. It just seems almost incomprehensible to believe the tragic circumstances that we heard here. The family pleasure boat run over by a Korean freighter in international waters is certainly bad enough. But to think that there was absolutely no attempt by the Korean vessel to rescue the family or even to notify the authorities for the collision is, again, just almost so painful as to be incomprehensible.

I just wanted to ask you a couple of questions. As you know, I am going to continue to work with the chair of this subcommittee and Senator McCain to come up with a remedy for this kind of situation. Because I do not want to see other families go through this. And just a couple of questions for you.

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Now, it is our understanding that the civil case between Judith and the Korean shipping company was settled. Do you feel that there was an adequate settlement under the current Death on the High Seas statute?

Mr. SLEAVIN. The case was not settled because Judith thought it was a fair settlement. It was settled because she could no longer, basically, stand up to the emotional stress and the aggressive tactics the Koreans were going after her with. And she had very little to fight with.

Senator WYDEN. What were some of these tactics?

Mr. SLEAVIN. The Koreans had detectives follow her around while she was in New Zealand, after she got out of the hospital. This increased the occurrences of her flashbacks. They were seeking access, of course, to all of her medical records, including her psychological records. Which made her feel, basically, unsafe.

There was no one she could talk these issues through with. She was afraid anything she talked to her psychologist about would wind up in court. And it was, again, increasing her stress. And we all became very worried for her survival.

Senator WYDEN. Were there particularly aggressive tactics that you feel the subcommittee ought to be aware of?

Mr. SLEAVIN. I think mainly the detectives that were following here made themselves very visible. This was in New Zealand, which has very few Southeast Asians in it. And those were all detectives that were sent there.

I think there reason for being there and their visibility to her was very obvious. It was harassment. That was sort of the worst of it. And it was just how they approached her in negotiations. They would start negotiations and then refuse to move anywhere on it. It was devastating to her, hoping that maybe she could get through this and getting nowhere.

Senator WYDEN. Did they first claim never to even be in the area where Mike, Ben and Annie were killed?

Mr. SLEAVIN. Yes. When they were first contacted, the Korean freighter claimed never to have been in the area of the *Melinda Lee*. Then they claimed to have been in the area, but never saw the ship.

Later, when it was slipped that one of the crewmen did see the ship in testimony, they claimed that they saw the ship but they never hit it. And when they finally came near port, they anchored off the coast of Korea in international waters and had helicopters ferrying the members of the shipping company to and from the ship. By the time it finally did come into port, there was a 17-hour paper jam in the recorder of the ship. And that is the 17-hour period surrounding when the *Melinda Lee* was sunk.

This is a course recorder similar sort of to a black box—slightly different. So that no one could determine exactly where they were or what their actions were, if the ship turned around or what it did. But the damning evidence was the paint marks all over the bow of the ship that matched the dingy and my brother's boat.

Senator WYDEN. One question for you, Mr. Danoff. You essentially imply that there is something wrong with the United States allowing our courts to be available as a forum for seeking compensation for wrongful deaths on the high seas. My question would

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be, if U.S. citizens are unable to obtain justice in foreign courts, why should not the U.S. courts be available to folks like the Sleavin family, so that they can get just compensation according to the standards of our society?

Mr. DANOFF. I agree that U.S. citizens should be allowed to sue in the United States under DOHSA even if the accident is in international waters. My concern is with non-U.S. citizens, who have remedies in their own countries, coming here to sue because our remedies are more liberal than their remedies.

And in that regard, in response in part to Senator Hutchison's question, there are States that have laws precluding the dismissal of such suits for forum non-conveniens. So I want American citizens to have remedies, but I do not want their remedies to be delayed by clogged up courts from cases filed by non-U.S. citizens, who really should be suing in their home country.

Senator WYDEN. Well, I will tell you that the example that Mr. Sleavin has given us is to me so shocking and so horrendous in how it transpired and the fact that there was no attempt to rescue the family that I am going to do everything I can to make sure that folks like the Sleavins do not go through this again. I mean we have a situation here where the evidence indicates that international standards of maritime navigation safety were flouted. They may have violated at least seven navigation rules commonly required to be followed by mariners.

We have got a situation where Korean officials may have engaged in a coverup of some of this conduct. And it just seems to me that these are folks who ought to have a remedy.

And I just want you to know, Mr. Sleavin, how much we appreciate your coming. These are very difficult memories to have to come before the U.S. Senate and talk about. And I want you to go home to Portland knowing that we are going to just pull out all the stops to make sure that you have a remedy. It is in the record that you have no financial interest in this matter.

And you summed it up: Families deserve some justice and peace. And Senator Specter has a good bill in its current form. As you know, Senator Smith and I have worked hard to try to get justice and peace for other victims in the C–130 crash. And fortunately the Specter legislation does have some relief for those Oregon families. But we have got to address the concerns that you have brought.

And given the thoughtfulness that has been shown to Oregon by our chair, Senator Hutchison, and the chair of the full committee, I think we are off to a strong start. And we are going to be working closely with you.

And I thank you for the time.

Senator HUTCHISON. Thank you, Senator Wyden. You were very eloquent. And I think your constituents should be certainly very aware of the concern that you have and your willingness to work hard on their behalf.

I thank all of you for especially waiting all afternoon. I know it was not convenient. And I really apologize for the schedule. Unfortunately, we are never quite sure, when we are voting in the afternoon, exactly how long it is going to take. So thank you for your patience. Thank you for the quality of your testimony. Certainly it will be helpful to us as we do try to provide a remedy.

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I think all of us want to do that. So now we just have to find the way. And that is what you have helped us do.

Thank you.

[Whereupon, at 5:35 p.m., the hearing was adjourned.]

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# APPENDIX

## PREPARED STATEMENT OF MICHAEL F. STURLEY, STANLEY D. AND SANDRA J. ROSENBERG CENTENNIAL PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF TEXAS AT AUSTIN

I am a Professor of Law on the faculty of the University of Texas at Austin, where I regularly teach, research, and write about the law governing the carriage of goods by sea. I am a Member of the Executive Committee (and past-Chairman) of the Maritime Law Section of the Association of American Law Schools; a Proctor Member of the Maritime Law Association of the United States ("MLA"); the Book Review Editor and a Member of the Editorial Board of The Journal of Maritime Law and Commerce; and a contributing author (addressing the carriage of goods by sea) to Benedict on Admiralty.[1]

Since 1936, the U.S. statute governing the carriage of goods by sea has been the Carriage of Goods by Sea Act ("1936 COGSA"), which is the domestic enactment of an international convention commonly known as the Hague Rules. I have described the history of the 1936 COGSA extensively in a law review article, The History of COGSA and the Hague Rules, 22 Journal of Maritime Law & Commerce 1 (1991). I attach a copy of this article for the Subcommittee's information.

Efforts to update the Hague Rules began in the late 1950s. In 1968, a diplomatic conference completed the Visby Protocol, which amends the Hague Rules in several significant respects and corrects some of the specific problems that have arisen. The Hague-Visby Rules (the name given to the Hague Rules as amended by the Visby Protocol) are now in force for most of our important trading partners.

Shortly after the completion of the Visby Protocol, the United Nations Commission on International Trade Law ("UNCITRAL") began a complete revision of the Hague Rules. The resulting U.N. Convention on the Carriage of Goods by Sea (known as the "Hamburg Rules"), completed in 1978, is now in force in about twenty-five countries.

In the United States, carriers and many cargo interests have long favored the adoption of the Visby Protocol, while other cargo interests have favored the adoption of the Hamburg Rules. Thus there has long been widespread agreement that the 1936 COGSA and the Hague Rules are outdated and must be amended or repealed, but there has been disagreement on which course the updating should follow.

As an academic lawyer, I do not regularly represent any of the business interests involved in the carriage of goods by sea. To the extent that I have done consulting work, it has been on behalf of cargo interests, carrier interests, and stevedores. In other words, I am impartial among the relevant business interests. My concerns are instead with achieving such neutral values as uniformity, predictability, and rationality. Achieving these goals would benefit all of the business interests, and would ultimately benefit the nation as a whole.

In an effort to resolve the disagreements among the affected business interests, the MLA convened an Ad Hoc Liability Rules Study Group in 1992. Although most of the members of the Group regularly represent the relevant interests, I was invited to join as the Reporter to provide a neutral perspective and to draft the final product. Ultimately, the full MLA membership endorsed the Study Group's final report in 1996, and the Group's recommended amendments to the 1936 COGSA are now before this Subcommittee. I have described the Study Group process and our recommendations extensively in a law review article, Proposed Amendments to the Carriage of Goods by Sea Act, 18 Houston Journal of International Law 609 (1996). I attach a copy of this article for the Subcommittee's information.

The MLA Study Group's proposal builds on the 1936 COGSA and the experience that has already developed under it. In many respects, existing law would remain

[1] I mention this information so that the Subcommittee will be aware of my background in this field. The views I express here are solely my own, and do not necessarily represent the views of any of the entities with which I am associated.



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unchanged. In other respects, the proposal simply recommends restoring U.S. law to the original understanding of the Hague Rules, rejecting inconsistent judicial doctrines that have departed from the internationally accepted intent. But even where genuine changes are proposed, the framework is that established by the Hague Rules and continued in the Hague-Visby Rules. The final result would be a legal regime that is not only better suited to the modern needs of the commercial world but is also closer than the 1936 COGSA to the legal regimes in force in the United States' major trading partners. I have discussed the impact of the proposal on international uniformity more fully in a law review article, Uniformity in the Law Governing the Carriage of Goods by Sea, 26 Journal of Maritime Law & Commerce 553 (1995). I attach a copy of this article for the Subcommittee's information.

Although the MLA proposal would make a number of specific changes to the 1936 COGSA, the proposal is not a series of isolated changes. Rather, the overall compromise must be taken as a whole, for individual aspects are acceptable to specific segments of the industry only because they are balanced by other changes to the law found elsewhere in the proposed legislation. No one is happy with every aspect of the report or the proposed amendments. Everyone would prefer to get a "better deal" for his or her own interests. But in the end, the proposal will work because almost everyone finds it better than the current deadlock in which no progress is possible, and the 1936 COGSA remains the law through simple inertia.

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PREPARED STATEMENT OF VINCENT M. DEORCHIS, CHAIRMAN, CARRIAGE OF GOODS COMMITTEE, U.S. MARITIME LAW ASSOCIATION

With reference to the Sub-committee hearing held on April 21, 1998, concerning the captioned proposed legislation, please accept this letter as further testimony in support of the COGSA '98 Proposal.

I have been practicing maritime law for more than twenty four years. I am a proctor in the United States Maritime Law Association. I am also the Chairman of the Committee on Carriage of Goods for the Maritime Law Association, which is responsible for having drafted the proposed legislation. In order to assist the Senate Subcommittee in its review of the Proposal, I take this opportunity to provide some background information which may be helpful in understanding the importance of this legislation:

The Proposal is the result of a compromise worked out by my Committee, which is comprised of 137 members who represent almost every facet of the maritime industry. The compromise took nearly 5 years to accomplish. Hearings were held in most of the major port cities of the United States during 1995 and 1996 in order to make sure that everyone fully understood the ramifications of the Proposal, and to fine-tune the language. The Proposal was voted upon by the main body of the Maritime Law Association on May 3, 1996, and was passed by an overwhelming majority of the attending members.

There are two critical elements to the foundation of the compromise: (a) Cargo interests wanted the Hamburg Rules to be adopted in the United States. Vessel interests wanted the Visby Amendments to apply. In exchange for accepting the Visby Amendments, vessel interests agreed to remove the "error in navigation and management" defense under 46 U.S.C. Sec. 1304 (2) (a) of the existing COGSA. (b) Furthermore, in exchange for allowing cargo interests a clause prohibiting foreign forum clauses in ocean carrier bills of ladings, vessel interests were allowed to insert clauses that improved burdens of proof rules, allowed fair allocation of damages when multiple causes of loss are involved, and permit application of the U.S. Bills of Ladings (Pomerene) Act to both inbound and outbound shipments.

One of the most important tasks of my Committee was to identify areas of unnecessary litigation under the present COGSA, and to try and cure those problems with the new Proposal. Given the fact that the present COGSA was enacted in 1936, and is almost entirely based on the Hague Convention of 1924, our present day law is virtually founded on language formulated during a period when cargo was carried break-bulk by coal fired merchant vessels and loaded and discharged mostly by hand. COGSA did not, and could not, predict the great technological strides that the industry has taken, especially in the last half of this century. Containers, ro-ro, intermodal and multimodal, rationalization, service contracts and feeder service are all words and concepts that did not exist when the original COGSA was enacted. The result is that much of modern day maritime law is legislated by the courts and not the statute. This has resulted in conflicts between the circuits and a lack of predictability in our law. Consequently, the global marine community does not have the high confidence in American maritime law that it had many years ago.

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The Proposal takes the bold step of trying to unify the law when multi-modal transport is involved under a single bill of lading which requires both land and sea transport. Rather than confront the patchwork quilt of laws, both federal, state and local, which now apply to such shipments, the Proposal seeks to govern those shipments with a single law, so that there is a more predictable scheme of liability and defenses, uniformity of treatment of carriers and their sub-contractors, and a reduction in litigation where gaps exists between existing laws and on issues of indemnification or contribution.

There are foreign interests abroad who are opposed to the COGSA '98 Proposal because it may restrict the transfer of cargo claims from the U.S. to places overseas which may be both prejudicial and pragmatically inaccessible to American cargo interests. Furthermore, certain foreign interests have made it clear they would prefer to see European laws control aspects of intermodal shipments, rather than American law. The bottom line is that the Proposal by the Maritime Law Association is based primarily on protecting American interests, not foreign.

There has also been opposition by some members of the American Waterways Operators to the Proposal. The Maritime Law Association has attempted on several occasions, especially since last Summer when the AWO first voiced some concern, to discuss their objections and provide assistance in the analysis of the new COGSA Proposal. To the extent that the AWO has some concern that Contracts of Affreightments or Towage Contracts (the principle types of contracts involved in their business) are not governed by COGSA '98, my Committee has made it clear that there was never any intention on the Maritime Law Association's part to include such contracts. Furthermore, my Committee has also made it clear that if the AWO wanted to add language to the Proposal to make it clear that Contracts of Affreightments and Towage Contracts are not governed, we had no objection. However, the AWO's primary objection appears to be that although most of their contracts would not be directly affected by COGSA '98, because they are involved in inland transportation, the AWO apparently fears that the market place may place pressure on their members to modify their contracts (which presently incorporate COGSA '36 by reference), and seek the higher limits of liability under COGSA '98. This is a commercial problem involving freedom of contract principles between the AWO members and their customers. It does not justify the holding back on the COGSA '98 legislation which is very much needed by the maritime community directly affected by the statute, i.e., shippers, carriers, stevedores, terminal operators, forwarders and their respective underwriters. All of these interests have joined in supporting our Poroposal.

On behalf of my Committee on Carriage of Goods, I respectfully ask that the Senate Committee on Commerce, Science and Transportation endorse our proposed COGSA '98 legislation and allow its introduction as soon as is possible. The failure to reform our present COGSA '36 is having a serious effect on the economy and consequences of claims arising out of the carriage of goods by ocean going vessels. It is in the interest of all U.S. companies directly involved in this trade to see the COGSA '98 Proposal enacted as soon as possible. It will benefit carrier and cargo interests alike, clarify the legal rights and responsibilities, and reduce the high volume of cargo litigation now burdening our federal courts.

I thank you for your attention and indulgence to the contents of this letter, and I would respectfully request that it be added to the record concerning this Proposal.

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ASSOCIATION OF AMERICAN RAILROADS,
*Washington, DC, April 24, 1998.*

Hon. KAY BAILEY HUTCHISON, *Chairwoman,*
*Subcommittee on Surface Transportation and Merchant Marine,*
*U.S. Senate, Washington, DC.*

DEAR MADAM CHAIRWOMAN: On behalf of the Association of American Railroads (AAR), I am writing regarding the proposed revision of the Carriage of Goods by Sea Act (COGSA). I would also request that this letter be included in the official record of the Subcommittee's hearing on this matter, which was held on April 21, 1998.

While COGSA does not currently apply to inland transportation, such as interstate trucking and rail carriers, and the revised COGSA, as proposed by the Maritime Law Association, would not alter or expand such application, the railroads are concerned that the revised COGSA could be interpreted in such a manner as to end certain damage liability protections which are today extended to railroads and motor carriers. Courts have consistently granted to inland carriers the benefit of the pack-

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age damage liability limitation to the extent that benefit is extended in the ocean carrier's contract.

In order to preserve our present rights, the railroads request that any revised COGSA contain the following statutory provision:

> "This Act shall not apply to claims against a motor or rail carrier that is not the contracting carrier to the extent that it is providing motor, rail, or related services, provided however, that this exemption shall not prohibit any extension of rights to a motor or rail carrier by a contract of carriage nor adversely affect or void any rights so extended."

I appreciate your consideration of this request, and would reiterate that the railroads are not here seeking anything new, different or beyond our present rights.

Sincerely,

J.A. HAGEN,
*President.*

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PREPARED STATEMENT OF CURTIS W. KEYES, PRESIDENT, INTERNATIONAL CARGO LOSS PREVENTION, INC.

To Senator Hutchison and Members of the Subcommittee:

I want to thank you for the opportunity to express my views, and those held by many small and larger shippers alike, about the Carriage of Goods by Sea Act of 1998 (COGSA 98) as drafted and proposed by the Maritime Law Association of the United States (MLA).

I have had the opportunity to review the written testimony of Mr. Chester D. Hooper, Immediate Past President of the MLA and I applaud the MLA for its extraordinary effort in forging a compromise between the many sectors of the maritime industry in our country.

As President and founder of International Cargo Loss Prevention, Inc., our firm represents cargo insurers and shippers of all persuasions. We work with U.S. domiciled importers and exporters, and are involved in cargo losses from first notice of loss up to and including the management of the litigation effort conducted on behalf of insured and non-insured shippers.

I started ICLP fifteen years ago, and prior to that time I was Vice-President of International Adjusters (Western) Ltd., a California based company which also acted in the capacity as a claim-settling agency.

ICLP was conceived in order to apply risk management principles to the areas of cargo loss prevention, loss mitigation, and in particular, to introduce a high level of product knowledge and legal expertise at the inception of loss so that cargo claim settlements among divergent parties could be amicably settled and recoveries against carriers could be expedited.

During my (23) years in the maritime industry I have worked exclusively in the area of cargo claim resolution and recovery. I have met with more than (250) marine insurers, specifically, cargo underwriters and their claim managers, in their place of business in more than (20) countries. During this same time I have worked on cases involving every conceivable type of cargo damage; from multi-million dollar shipments of industrial products, such as steel, forest products, grains, liquid bulk shipments, produce, containerized shipments of seafood, meat, other foodstuffs, and electronic goods, to containerized movements of personal effects.

The revisions in COGSA 98, as proposed by the MLA, address many of the inequities which evolved as a result of the changes and advances in technology and communication experienced during the past 60 years. However, we propose two additional revisions which we believe would serve to benefit all American shippers, and in particular, shippers of high valued cargo.

Our first proposed addition will create an obligation on the "carrier" to weigh full containerized shipments when they accept delivery of the container and to weigh the container again when the container is delivered at the port of discharge.

Our firm has investigated many cargo loss cases involving the theft of partial shipments from properly sealed full container loads (FCL), when original shipping seals affixed by the shipper or carrier remained intact. A number of investigations by our firm and others have shown various means by which the doors of an FCL or it's locking handle mechanism could be removed thus allowing the goods to be removed, and the doors to be resecured with the original shipping seal remaining intact. In short, criminal elements have learned how to compromise sealed container integrity.

The weighing of a FCL is not a laborious or strange task for the "carrier" or their subagents to accomplish. The face of the bill of lading is often inscribed with the FCL's net and gross weights, because the "carrier" will often charge freight based

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on weight determinations. Furthermore, the passage of the "National Transportation Safety Board Authorization Act of 1996" included a requirement that the first intermodal carrier weigh FCL's and to certify that such are not overweight, this being an important requirement for safeguarding the public interest and the transportation infrastructure of the United States.

Our proposed revision will not subject the "carrier" to any shortage claims which are not fully documented. If a shipper presents a FCL "said to contain" 25,000 pounds, and such is inscribed on the Bill of Lading, and the carrier's weight determination may show the FCL weighs only 23,000 pounds, the carrier is only legally bound to deliver 23,000 pounds of goods. Obviously, if the "carrier" takes delivery of 23,000 pounds, and delivers 18,000 pounds, such discrepancies would represent prima facie evidence that the "carrier" is responsible for the loss. In the initial example, the weight documentation would show the original shipper to be responsible for the shortage, or the shipper's agent, as long as the "carrier" did not take delivery at an inland destination.

COGSA 98, as presently drafted by the MLA, would permit the "carrier" to exonerate itself from liability to US importers and exporters for product losses involving shortages and non-deliveries when the container seal "appears" to have been intact at time of delivery.

The second provision we recommend is to create an obligation on the "carrier" or the carriers agent to promptly and thoroughly investigate all claims submitted by all claimants suffering cargo loss or damage, to respond in writing within a reasonable period of time, stating the facts and conclusions of their investigation, and to make a good faith effort to resolve the claim.

The resolution of cargo claims lodged against "carriers" relies upon a good faith dialogue between parties where evidence of the facts, COGSA and case law are earnestly debated. It is common knowledge among cargo and carrier interests that less than two percent of all cargo claims lodged culminate in the filing of a lawsuit. Moreover, of the two percent which enter the litigation process, only a very small fraction move through trial.

Unfortunately, it is our experience that the "carrier" and their agents appointed to investigate and defend claims are notorious for placing extraordinary barriers on the path of substantive discussions concerning the merits of the claim, in the hopes an unsophisticated claimant will overlook a time-statue deadline and inadvertently allow the claim to be "time barred." The barriers put into place represent absolute silence on the part of the "carrier" or its agents, the delegating of the claim defense from the "carriers" claim department to their insurer (P & I Club), to the insurer's North American and/or foreign correspondent.

The shuttling of the claim and the documentation presented by the claimant from one "carrier" entity to another creates a labyrinth of obstacles which inexcusably delays a substantive dialogue and places the cargo claimant in greater jeopardy of falling, unwittingly, into a time-bar situation or forces the cargo claimant to file suit.

In light of the volume of cargo claims processed in this "out of court" arena and the rapid growth of international trade we believe it is imperative that COGSA 98 recognize the duty of the "carrier" to respond reasonably and promptly to all claims.

Cargo damage or loss stemming from either the importation or exportation of a shipment from or to the United States places a substantial financial burden on the cargo claimant, even when the claimant is free to litigate the claim in the United States. One current case comes to mind, a very detailed and well documented loss in the amount of $207,000 was presented to the carrier on January 21, 1998. The carrier was advised of the damages to the cargo within two days after delivery of the goods on June 20, 1997 and actively participated in the findings of loss through their appointed surveyor. The carrier had a full survey report and photographs detailing the character and extent of loss as completed by their appointed surveyor, in their possession by September 1997.

Other than acknowledging receipt of the claim with a standard form indicating their claim reference number, and despite more than (15) attempts by cargo interests to enter into a substantive dialogue, the carrier, its P & I Club, and the law firm appointed to represent the "carrier" ignored all written and oral attempts to commence a substantive dialogue. It was not until cargo interests agreed to travel two thousand miles to meet with the counsel representing the law firm did the law firm first examine the case file.

This case also illustrates the financial burdens involved with entering into the litigation process and seeking a court ruling on a genuine dispute. Our example involves the shipment of seafood from a mainland China seafood processing facility via a Hong Kong supplier to an American joint venture partner, who also acted as the importer. Thousands of dollars of laboratory costs were incurred by cargo inter-

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ests to demonstrate the product arrived spoiled because of sustained temperature abuse experienced during the (52) day period the carrier provided care and custody. If cargo interests were forced into litigation and a trial scenario, no less than (6) parties on Mainland China and in Hong Kong would have to be deposed. Obviously, witnesses would have to be brought to the USA at considerable costs and more than (12) parties would have to be deposed and summoned as witnesses on the US side of the transaction and demonstration of loss phase of investigation. When one combines expert testimony of food technologists and micro-biologists to this entourage, it is apparent that litigation costs could easily exceed the amount of the claim. When one considers the many thousands of smaller claims filed by cargo interests, it is understandable why 98% of cargo claims filed direct with carriers are financially closed out of the judicial process.

We recommend that the draft bill to revise the Carriage of Goods By Sea Act, as recommended by the MLA, be amended as follows to incorporate the two proposals we have detailed:

*Section 5(a)*

In line three, after the word "receiving" add the word "weighing" and in line four, after the word "discharge" add the words "discharge weight"

*Section 6 (b)*

After the word "receive" in line three, add the word "weigh," In line four, after the word "dischargo" add the word "weigh"

*Section 7 (c)(1)(C)*

In line two, after the word "quantity" add a comma, delete the word "or" and add the words "and the" before the word "weight"

*Section 7 (c)(2)*

In line two, after the word "number", delete the comma and add the word "or" and after the word "quantity" delete the words "or weight"

*Section 7 (e)(1)(A)*

In line three, after the word "number," add the word "or" and after the word "quantity" delete the words "or weight"

*Section 7(e)(1)(C)*

In line one, after the word "number," add the word "or" and after the word "quantity" delete the words "or weight"

*Section 7(g)*

Delete this subsection (g) in its entirety and re-letter the remaining subsections accordingly.

*Section 12*

Add a new subsection (e) as follows:

"(e) TIME FOR RESPONSE.—When a claim for loss or damage and the general nature of the loss or damage is presented in writing to the contracting carrier or its agent, or the performing carrier making the delivery or its agent, the recipient of the claim shall promptly and thoroughly investigate the claim with all parties involved in the transit and shall respond to the claimant in writing within a reasonable period of time, stating the facts and conclusions of their investigation, and shall make a good faith effort to resolve the claim."

I thank you for this opportunity to provide a shipper's perspective into the real world cargo claim process and encourage you to create an equitable COGSA 98 that will be accessible to shippers of varying financial strength.

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PREPARED STATEMENT OF THE INTERNATIONAL GROUP OF P&I CLUBS

The International Group of P&I Clubs ("the Group") consists of 15 mutual, non-profit insurance companies ("P&I Clubs") who collectively insure the liabilities of over 95% of the world's ocean going merchant fleet. As such, the P&I Clubs, and their shipowner members, have a very real and direct interest in laws governing the carriage of goods by sea and thus in the Maritime Law Association's proposed revision of the United States' Carriage of Goods by Sea Act, 1936 ("COGSN').

While the Group agrees with the basic premise underlying the MLA proposal, that laws involving the carriage of goods by sea require updating due to changes in the manner in which goods are now transported in international commerce, the Group firmly believes that the most constructive and beneficial means of doing so is

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through a restructuring of the international regime, with the much needed uniformity such a restructuring would bring, rather than by a unilateral nation-by-nation approach as exemplified by the MLA proposal.

As is recognized by all concerned, the state of the law relating to liabilities arising out of the carriage of goods by sea is one of disarray. There is a great need to bring uniformity to the law on an international scale. In recognition of this, the Comité Maritime International ("CNH") and the United Nations Commission on International Trade Law ("UNCITRAL") are currently working toward the development of a revised international legal regime which will bring uniformity to the treatment of liabilities arising out of the carriage of goods by sea. Indeed, the need for uniformity has become even more essential as the world has moved into the era of electronic commerce—as recently noted by CNH's President, Patrick Griggs: "it has come to be recognized that in order to translate shipping trade practice into electronic means it will be essential to achieve a greater degree of uniformity in relation to transport law generally."

The Group respectfully submits that the energies of the United States should be directed toward the development and implementation, in cooperation with UNCITRAL and the CNH, of a full-scale, updated, uniform international regime governing the carriage of goods by sea, rather than toward the unilateral reworking of the United States' COGSA, which would carry the world's major trading partner even farther from the current international mainstream of such law, and make all the more difficult, if not impossible, the very necessary achievement of a modern, uniform international regime which will work to the benefit of all sectors of international commerce.

We would therefore urge that the United States Government, the NELA and its carrier and sepper industries join with their international counterparts to bring a new international regime to a timely and productive fruition.

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PREPARED STATEMENT OF THE INTERNATIONAL CHAMBER OF SHIPPING

The International Chamber of Shipping (ICS) represents the interests of 42 national shipowners' associations in 37 countries, together covering more than 50% of the world's merchant tonnage. ICS represents all sectors of the shipping industry serving markets throughout the world including the U.S.

ICS members have followed with growing concern the progress of the proposals of the Maritime Law Association of the United States (MLA) to revise the United States Carriage of Goods by Sea Act, 1936 (US COGSA). When viewed in an international context, the proposals have the potential to seriously undermine international uniformity of the law relating to the carriage of goods by sea.

We appreciate that the proposals are the result of several years' concentrated effort, and many of the recommendations are sensible and well-considered. However, the international shipping industry regards the proposed departure from the widely-accepted liability framework of the Hague-Visby Rules as misconceived, and ICS must therefore register its firm opposition to the package as a whole.

We recognize that the US has not ratified the Visby Protocol to the Hague Rules. Nonetheless in our view any new US legislation in this area should be shaped around the provisions of that Protocol to ensure that the US remains in the mainstream of trading nations.

It has been suggested by the proponents of unilateral US action that there is already a high degree of non-uniformity of the law relating to the carriage ot goods by sea. Indeed, the current international situation is not ideal. But ICS believes that the level of non-uniformity has been overstated. The world's major maritime nations have adopted the Hague-Visby Rules and the majority of the world's carriers contractually incorporate the Hague-Visby Rules in their contracts of carriage.

Furthermore, the international community is already addressing these issues. The Comité Maritime International (CMI), following a request from the United Nations Commission on International Trade Law (UNCITRAL), has work in progress on the harmonization of laws relating to international carriage of goods by sea.

The MLA proposals also contain a provision to overturn a U.S. Supreme Court decision which allows contracting parties to agree the venue for arbitration disputes. We believe it is unreasonable to seek to overturn that U.S. Supreme Court decision so that any party that has freely entered into a contract which stipulates a foreign venue would have the right at a later stage to go back an their agreement and insist that arbitration should take place in the U.S. That would be both contrary to the principle of freedom of contract and introduce an element of uncertainty into the commercial relations.

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We would therefore urge the United States to defer consideration of the MLA's proposals to amend US COGSA and instead, to join in the international movement instigated by UNCITRAL and led by the CMI to develop a uniform international regime for the carriage of goods by sea.

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PREPARED STATEMENT OF GERARD R. DIK, DEPUTY SECRETARY GENERAL, THE BALTIC AND INTERNATIONAL MARITIME COUNCIL

BIMCO is tho world's largest private international shipowners' organisation with more than 2700 members in 114 countries representing 60% of the world's merchant tonnage. For over 90 years BIMCO has been actively involved, on behalf of its membership, in the pursuit of greater harmonisation of maritime laws, rules and regulations pertaining to international shipping. Since 1992 BIMCO has monitored with much interest the work of the Maritime Law Association of the United States (MLA) with respect to the proposed revision of the United States Carriage of Goods by Sea Act, 1936 (TJS COGSA).

We have recently received a copy of the revised draft proposal of the U.S. COGSA dated 19 March 1998 which we understand is to be put forward to the United States Senate for possible adoption. BIMCO readily acknowledges that a considerable amount of work has been put into this proposal and that the draft undoubtedly represents some improvements to the existing law. However, BIMCO is extremely concerned that some aspects of the draft US COGSA represent a radical and unwelcome departure from the generally accepted structure of international maritime law. The changes to the COGSA 1936 that are of the greatest concern to BRMCO are:

1. The elimination of the shipowners' defence of error in navigation and management of the vessel.

2. The reversal of the contractual parties' right to decide the most appropriate forum for the resolution of a dispute when a US port or place of loading or discharge is involved.

BIMCO strongly believes that the above two fundamental changes proposed by the draft COGSA are not in the best interest of the international trading community and if adopted would lead to a further de-unification of the body of maritime law which has developed over this century. We respectfully submit for consideration by the Subcommittee on Surface Transportation and Merchant Marine the reasoning behind our objections to the draft US COGSA as follows:

1. THE ELIMINATION OF THE SHIPOWNERS' DEFENCE OF ERROR IN NAVIGATION AND MANAGEMENT OF THE VESSEL

While the draft revision of the US COGSA is largely based on the Hague-Visby Rules, it differs fundamentally from the Rules in the area of shipowners' liability by removing the defence of error of navigation and management of the vessel. Although the removal of the relevant defences are qualified to the extent that the cargo interest in some instances will have the burden to prove the error of navigation or management, it is beyond doubt that the revised US COGSA overturns a longstanding tradition and well-founded principle in shipping, i.e., that where there is crew negligence involved putting both the cargo and the vessel equally at risk, then the shipowners are not to be held liable. Most vessels engaged in international shipping are insured with a P & I Club where insurance premiums for loss or damage to cargo in respect of crew negligence take into account the fact that shipowners will be able to rely on the well-known Hague and Hague-Visby Rule defences, including those of error in navigation or management of the vessel.

An important consideration in this context is that the whole question of liabilities in the carriage of coods by sea is essentially one of allocating risks which the relevant parties can then insure against. The Hague and Hague-Visby Rules provide a universally accepted framework for such an allocation and subsequent jurisprudence has underpinned this framework, leading to a situation where all players in the field of international trade and transport know where they stand. Efforts to reallocate the risks will not in themselves change the total cost of insurance eventually to be paid by the goods. It is entirely possible that such disconcerted efforts will only lead to higher costs of insurance as well as increased litigation. It is this realisation which causes many of the parties involved in international trade and transport, including BIMCO, to oppose unilateral changes.

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2. THE REVERSAL OF THE CONTRACTUAL PARTIES' RIGHT TO DECIDE THE MOST APPROPRIATE FORUM FOR THE RESOLUTION OF A DISPUTE WHEN A US PORT OR PLACE OF LOADING OR DISCHARGE IS INVOLVED

In 1995 the US Supreme Court made clear in the case of *"Vimar Securos Y Reaseguros* v. *M/V Sky Reefer"* that the US COGSA does not nullify foreign arbitration clauses contained in maritime bills of lading specifying arbitration outside the United States, if such clauses do not lessen liability established in accordance with the provisions of COGSA.

In BIMCO's view, this decision is clearly in line with principles embodied in international shipping which ensure the right of commercial parties to decide freely the most convenient and appropriate venue to resolve a dispute.

The new proposed draft revision of the US COGSA will essentially overrule the decision made in the *"Sky Reefer"* by invalidating any provision specifying an overseas forum for litigation or arbitration in the event the port or place of loading or discharge is situated in the United States. BINLCO is very concerned about this subjugation of the rights of commercial parties which has little merit in an ever-increasing global trading community.

For many years BIMCO has been closely involved in the development of shipping documentation and is the acknowledged industry leader in this field. Today, BIMCO's name is synonymous with some of the industry's most frequently used charter parties, bills of ladinq, waybills and other documents.

In 1994 BIMCO considered a revision of the most internationally used general voyage charter party i.e. the Standard "Gencon" Charter which, as a notable feature did not contain an arbitration clause in the printed terms and conditions. As part of the 1994 revision, a large number of executed forms were analysed to determine the most common chanaes made during negotiations between parties. An interesting result of this analysis was that in the vast majority of cases an arbitration clause was incorporated in the Charter providing a convenient forum for arbitration for the commercial parties. Arbitration is by far the most commoniy used means of dispute resolution in the shipping industry today. Effectively eliminating the commercial parties' right to decide the place of arbitration where US trading is involved, in BIMCO's view, will not only seriously undermine the parties' right of freedom of contract as mentioned above but also disturb the predictability essential to every international business transaction.

Furthermore, one may only speculate on the resulting confusion if jurisdictions other than the United States undertook similar attempts to undermine the authority or competence of international fora for dispute resolution.

Of overall concem to BIMCO is that if the United States adopts a revised COGSA containing radical departures from Intemational Conventions governing the carriaoe of goods by sea then this could have the potentially detrimental effect of creating disunity in law on a worldwide basis. It must not be overlooked that the United States is one of the leading maritirne trading nations in the world and, as such, the revision of its COGSA as contemplated will invariably set a precedent for a number of other jurisdictions in the world in respect of carriage of goods by sea. The result would be a further proliferation of legal regimes which clearly is not in the interest of the industry as a whole.

It is furthermore, in BIMCO's view, unfortunate that the United States should contemplate adopting a revision of the 1936 U.S. COGSA at the very moment when an international movement led by UNCITRAL and the Comité Maritime International is underway to review the whole carriage of ooods by sea regime, not orily as far as liabilities are concemed, but also in the light of modern concepts of transport.

Not only is this likely to be detrimental to the credibility of the U.S. representatives at these international deliberations, but there is also a grave risk that the possible adoption of a new International Convention within the next decade will make a revised U.S. COGSA obsolete, or at the very least out of line with international practice.

Against this background and in consideration of the views stated above BRMCO would strongly advise against passing the proposed draft revision of the US COGSA into law.

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JOINT PREPARED STATEMENT OF A. FRANK CARVEN III AND HANS EPHRAIMSON-ABT

On January 16, 1996, the Supreme Court of the United States decided in *Zicherman* vs. *Korean Airlines* that fatal tragedies occurring more than three miles from the shores are governed by "The Death On The High Seas Act of 1920." Previously, on January 6, 1996, the Supreme Court of the United States had decided

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that fatalities occurring less than three miles from the shores, in coastal waters, were subject to the same laws as if they happened over land. The Supreme Court noted the inequity that it created by its decision and pointed to Congress to pass remedial legislation—as other countries had done already.

The Supreme Court's encouragement for Congress to revisit "The Death on The High Seas Act of 1920" was enhanced by the explosion of TWA Flight 800 on July 16, 1996, with 230 fatalities. This tragedy occurred high in the air over the seas, more than three miles from the shores of Long Island.

This Congress proceeded to address remedial legislation to "The Death On The High Seas Act of 1920." The House of Representatives adopted H.R. 2005 on July 28, 1997. Similar legislation is pending before the Senate in S 943. Both bills would exempt aviation law from "The Death On The High Seas Act of 1920."

Questions have been raised whether "The Death On The High Seas Act of 1920" should be amended as well—to restore equity of damages available to all victims of transportation tragedies, irrespective whether they occur on land, within three miles (coastal waters), or beyond three miles (high seas).

It took twelve years for Congress to debate—and finally enact a "Death On The High Seas Act of 1920." Then, transocean travel was exclusively by sea. Tragedies with major casualties were relatively rare. Learning from the "Titanic" disaster in 1912 and the sinking of the "Lusitania" in 1916 (an act of war), security and safety standards had markedly improved. The ancient seafarer tradition—maintained to this day—to save women, children and elderly persons first—limited fatalities essentially to men—the families' providers, hence "The Death On The High Seas Act of 1920" limitation to pecuniary damages, only.

In 1927—seven years after "The Death on The High Seas Act of 1920" became law, Charles Lindberg flew for the first time over the Atlantic ocean from the United States to Europe. This flight demonstrated another mode of transatlantic crossing: Travel by air over the seas.

In 1929, merely two years after the first transoceanic flight, thirty League of Nations countries signed an international aviation liability treaty which the United States joined in 1934, allowing damages according to the laws of the country where legal actions were brought, subject to prior finding of "Willful Misconduct" by the air carrier.

By 1955, travel by air had become the preferred mode of transportation—and surpassed travel by sea. Today, there exists hardly any scheduled transocean passenger traffic, with the exception of leisure, cruise ship, ferry, and commercial transportation, mostly on foreign flag vessels, with foreign crews.

Unlike sea travel with accident survival possibilities, ever larger airplanes with ever more passengers and at ever greater speeds fly over land or over water—up in the skies. If a tragedy occurs they explode in the air, or crash into the ground or the seas—with a high incidence of total fatalities, obliterating entire families.

Congress could not foresee in 1920 the historic changes in travel modes that developed barely ten years after it passed "The Death On The High Seas Act of 1920," as well as the changes int he range of casualties (the children, the elderly, the non-dependents, etc.) In 1920, ship crews were mostly male, today crews are of mixed gender. Flight attendants are mostly female. "The Death On The High Seas Act of 1920" was essentially meant to take care of families who lost their provider, excluding entire classes of persons who have become abandoned and unprotected victims since.

Inasmuch as since 1929 aviation law developed separate from "The Death On The High Seas Act of 1920," and since the kind and extent of air catastrophes differ somewhat from other accidents, it would stand to reason to exempt air tragedies from DOHSA—as is enacted in H.R. 2005 and proposed in S 943.

However, transocean travelers by sea are entitled to be treated in equity. Their travel modes and conditions have also changed over the last seventy-eight years. For them, remedial legislative action is equally as important.

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### Prepared Statement of Andreas F. Lowenfeld, Professor, New York University School of Law

Mr. Chairman and Members of the Committee: I am pleased and honored by your invitation to participate in the process of rethinking the United States approach to compensation for victims of transportation disasters. Of course the immediate focus is on the families of those who perished in the horrible disaster of TWA Flight #800. But that was not the first mass disaster involving international aviation—Lockerbie and KAL 007 come to mind, and also the American Airlines plane bound for Cali, and I am afraid it will not be the last one.

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I have been thinking about the problem of compensation for accident victims for some forty years, particularly in connection with efforts to revise, abolish, or replace the Warsaw Convention. As Deputy Legal Adviser to the State Department in the mid-1960's, I was among those who urged denunciation of the Convention, which then limited recovery to $8,300 per person unless "willful misconduct" was shown.[1] I led the American delegation to a famous meeting in Montreal early in 1966 which produced no concrete results but, I believe, changed the world's perception about how accident victims should be compensated.[2] A few months later, I was a principal draftsman of what came to be known as the Montreal Interim Agreement of 1966 which revived U.S. membership in the Warsaw system, raised the limit of liability to $75,000 per person, and eliminated, up to that amount, the issue of fault in international aviation accident litigation.[3] I am not altogether proud of my role in crafting the Montreal Agreement; it was really meant to be an interim accord, looking to a new treaty within five years, and it is now more than thirty years old. But the Montreal Agreement did accomplish a breakthrough both in United States law and in the law of many other countries, in that it established the principle of liability regardless of fault.

The problem of compensation for victims of transportation disasters has both a moral and a technical dimension, and I want to address both aspects in the brief time allotted to me.

I

Taking up the moral dimension first, it is clear to me that all accident victims or their survivors should be treated alike. There is no justification for distinguishing between ships and airplanes, between accidents over land or over the high seas, or (as in TWA #800) in between.[4] There is no justification for distinguishing between accidents on carriers that are state-owned, such as Iberia or Air France, as contrasted with carriers that are privately owned, such as British Airways or American Airlines. And from the viewpoint of the passengers or their survivors, there is no justification for distinguishing between accidents caused by the fault of the carrier, the manufacturer, the traffic controller, or a terrorist. The providers and their insurers—i.e., carriers, manufacturers and traffic controllers—should be able to sort out their respective contribution to the compensation of victims among themselves, and here relative fault is an appropriate criterion. But it is of no comfort to victims of disasters to know that the cause was mechanical failure, or pilot error, or sabotage, or that no one knows what happened, as seems to be the present status of TWA #800.

As to the amount of compensation, it is evident that no given sum can be said to be equivalent to the value of a person's life, and that we have no real way to measure that value. I think it follows that limiting compensation to "pecuniary loss" in a death case is an unjustifiable distortion, because it fails to take into account the loss suffered by the survivors. If you kill my child, it may save me money, yet there is no way you could hurt me more. Therefore non-economic as well as economic loss must figure in a just compensation scheme, and technical distinctions between wrongful death and survival claims are unpersuasive. Monetary ceilings on liability—once hotly contested—are obsolete, as well as being wrong on principle. I think punitive damages are generally unjustified, except for intentional criminal conduct. If a terrorist's rocket downed TWA #800, punitive damages against the terrorist and his sponsors would be justified. Similarly, if the Libyan government downed Pan Am #103, then (putting aside the intricacies of the law of state immunity) punitive damages are justified. But once "willful misconduct" as a way to escape the low limits of liability imposed by the Warsaw system is made unnecessary, the whole concept can be forgotten. No one except criminals wilfully causes an airplane or maritime disaster. Pan Am did not intend to bring down Flight 103, Ko-

[1] See Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 546–52 (1967).

[2] See id. 563–75; for the formal record, see ICAO, *Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and The Hague Protocol*, ICAO Doc. 8584–LC/154–182 (1966).

[3] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Agreement CAB 1890, approved by order E23680, May 13, 1966 (Docket 17325).

[4] In between because the definition of High Seas in the Death on the High Seas Act, 46 U.S.C. § 761 is one marine league, equal to three nautical miles, but President Reagan, by Proclamation, stated that the territorial sea of the United States henceforth extends to 12 nautical miles from the base lines of the United States determined in accordance with international law., Procl. 5928 of Dec. 17, 1988, *Public Papers of the Presidents*, Ronald Reagan 1988–89, Vol. II, p. 1657, 54 Fed. Reg. 777 (Jan.9, 1989). TWA Flight #800 went down approximately 9 nautical miles off the coast of Long Island.

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rean Airlines did not intend to bring down Flight 007, TWA did not intend to bring down Flight 800, American Airlines did not intend to bring down Flight 965. What is needed is a regime under which fair monetary compensation can be provided for those persons who have felt the pain—economic and non-economic—caused by a transportation disaster.

II

Let me now turn to the more technical part of the discussion, where this Committee's action, and the action of the Congress as a whole, is critical. The House of Representatives passed a very brief bill, providing only that the Death on the High Seas Act, 46 U.S.C. App. § 761–67, does not apply to aircraft accidents.[5] I understand this as a response to the Supreme Court's decision in the *Zicherman* case,[6] which held that the Death on the High Seas Act provides the sole source for determining what harm is cognizable and compensable in an American court for an aviation accident over the high seas, with the result that only certain stated persons may sue for damages (§ 761) and only pecuniary loss may be compensated (§ 762).

I sympathize with the proponents of this amendment, but I think it is inadequate on several levels. First, if Dohsa is unfair, as I believe it is, it should not remain on the books for maritime disasters, any more than for aviation disasters. True, we have not had a *Titanic* or *Lusitania* recently, but maritime disasters do occur, and their victims are no less deserving adequate compensation than are victims of airplane disasters. Second, saying Dohsa does not apply, as the House Bill does, gives no give clue as to what law does apply, either as to who may bring suit or how damages are to be measured. If Congress is going to legislate in this area, it ought to give more guidance, so as to avoid the unnecessary litigation that would be certain to follow from the void created S.943 as it now reads.

Third, and most important, the void may be deeper than anyone realizes. The problem arises because Dohsa at it reads at present has two functions:

(1) it creates a cause of action where it was thought none existed previously; and

(2) it specifies the elements of compensation, in ways that most of us consider inadequate. If Dohsa is now made inapplicable to aviation accidents, it is not clear what law would be applicable to support a cause of action for wrongful death.

We know now, after years of uncertainty, that the Warsaw Convention does create a cause of action against the carrier in international air transportation. That was the holding in the *Benjamins* case[7] decided by the Second Circuit in 1978 and accepted since that time. But what about suits against the manufacturers, or even against the regulators? And what about suits that do not come under the Warsaw Convention at all, including domestic flights over water, and flights to non-Warsaw destinations? If Dohsa does not apply, as H.R. 2005 and the Senate counterpart,[8] S. 943 would provide, and general maritime law does not apply, as Zicherman seems to hold,[9] there may not be any secure source of law for an action against parties that ought to be brought into a lawsuit arising out of an air accident. And even if general maritime law is applicable as a fallback, I don't believe that one can be sure that the problems sought to be cured by H.R. 2005 or S. 943 would be cured.

The law regarding compensation for maritime accidents can only be characterized as confused. In *Mobil Oil Corp.* v. *Higginbotham*,[10] which arose out of a helicopter accident over the Gulf of Mexico and took back many of the benefits that seemed to have been recognized a few years earlier in Gaudet,[11] the Supreme Court observed, correctly, that Congress had never enacted a comprehensive maritime code. But the Court went on to say, incorrectly, that Dohsa announced Congress' considered judgment on such issues as the beneficiaries, the limitations period, contribu-

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[5] H.R. 2005, 105th Cong. 1st Sess., approved by House of Representatives July 28, 1997, reproduced at p. 000 infra.

[6] *Zicherman* v. *Korean Air Lines Co.*, 116 S. Ct. 629 (1996).

[7] *Benjamins* v. *British European Airways*, 572 F.2d 913 (1978), cert. denied, 439 U.S. 1114 (1979).

[8] S.943. 105th Cong., 1st Sess., introduced June 20, 1997, reproduced at p. 000 infra.

[9] This is not completely clear, and I would not want to be cited as authority for that proposition. But the Second Circuit in *Zicherman* held that general maritime law does apply, *Zicherman* v. *Korean Air Lines*, 49 F. d 18 at 22, and that decision was reversed by the Supreme Court. One may expect that at the end of the day, it would beheld that a product liability action based on a disaster at sea could be brought against a manufacturer under general maritime law, since the rationale of *Zicherman* depended at least in part on the application of the Warsaw Convention, as would not be true in actions against a manufacturer. But counting on such a result is just inviting litigation about litigation, a phenomenon that families of accident victims know only too well.

[10] 436 U.S. 618 (1978).

[11] *Sea Land Service, Inc.* v. *Gaudet*, 414 U.S. 573 (1974).

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tory negligence, survival, and damages.[12] In fact, the Death on the High Seas Act was enacted as complement to the Jones Act,[13] which in turn was designed to place seamen in the same position as railroad workers under the Federal Employers' Liability Act.[14] As Professor Schoenbaum has written, the result is a "crazy-quilt pattern of wrongful death actions,"[15] far from "considered judgment" and certainly not a judgment on how to compensate victims of air transport disasters. I submit that the focus of attention produced by the tragedy of TWA Flight 800 should spur Congress now to "considered judgment" on how to deal with compensation for victims of transport accidents, or at least air transport accidents.

My first choice, which I have expressed over the years,[16] would be a comprehensive federal statute, conferring jurisdiction on federal courts (whether exclusive or concurrent), and adopting as substantive law the substance of what I laid out in the first part of my testimony. If all the elements of a system of accident compensation cannot command a majority in Congress, my second choice would be a system that clearly establishes the jurisdictional foundation and the principle of liability, but leaves the elements of compensation, including pain and suffering, loss of society, and eligible beneficiaries, to the law, including the measure of damages, of the state or nation where the victim was domiciled. In other words, if we cannot achieve agreement on substantive law, my second choice is a federal uniform choice of law rule. I believe reference to domicile or habitual residence is most likely to conform with the expectations of accident victims and their families, and most likely to result in damage awards consistent with the relevant values and social conditions, national insurance systems, and so on. It is true that reference to domicile may result in different awards in respect to passengers who sat side by side before the accident. But it will avoid awards grossly excessive or grossly inadequate in terms of the passengers' own living conditions, and may well make it easier to settle accident claims without the need for litigation. My colleague Allan Mendelsohn will spell out how such a rule based on domicile would work, and how it fits in with the recent developments among the major airlines in waiving some of the provisions of the Warsaw Convention.[17] The vision of the Warsaw Convention as providing a uniform measure of damages for accident victims has long ago been rendered obsolete. I am clear that a rule looking to domicile or habitual residence of the victims of an accident is more consistent than any other with modern views of what we call conflict of laws and much of the world calls private international law.

Since my recommendation would inevitably cause at least some delay, I ought to close with just a few words about retroactivity. We know from the Supreme Court's recent decision in the *Plaut* case[18] that Congress cannot by legislation reopen final judgments. But I do not believe that there is any impediment to legislation that would apply to pending actions, or to claims not yet filed, growing out of an event that occurred prior to passage of the legislation. There is nothing unfair about retroactive legislation concerning mass disasters, since no one—airlines, manufacturers, regulators, insurers—acted in reliance on immunity from suit arising from a catastrophic accident. It is necessary only that the intent of Congress is clearly expressed, as it is in both the House and the Senate bills.

In sum, I do not believe Congress needs to rush to judgment. I believe Congress should exercise "considered judgment," which is not evident in the present patchwork of statutes, treaties, interim agreements, and court decisions, and is not adequately reflected either in S. 943 or in H.R. 2005 as it has come out of the House of Representatives.

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## PREPARED STATEMENT OF ALLAN I. MENDELSOHN

Mr. Chairman and Members of the Committee:

### INTRODUCTION

I am pleased to be here this morning to discuss the very important subject of compensation for victims of international aviation disasters. The legislation before the

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[12] 436 U.S. at 625.
[13] 46 U.S.C. §688.
[14] 45 U.S.C. §51 et seq.
[15] Thomas J. Schoenbaum, Admiralty and Maritime Law, p. 465 (2d ed. 1994).
[16] See my testimony on the Tydings Bill, almost thirty years ago, *Aircraft Crash Litigation*, Hearings before Subcomm. on Improvements in Judicial Machinery of Senate Comm. on the Judiciary, 90th Cong. 2d Sess. on S 3305 and S. 3306 (1968), pp. 91–100. Also, Lowenfeld, "Mass Torts and the Conflict of Laws: The Airline Disaster," 1989 U. Ill. L. Rev. 157.
[17] See Mendelsohn, infra, at p. 000.
[18] *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

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Committee, S. 943 is intended to correct the Supreme Court's decision in the Zicherman case,[1] and thus to enhance the rights of the survivors of the victims of the KAL #007 and TWA #800 disasters beyond those granted by the outdated Death on the High Seas Act.[2]

As Professor Lowenfeld mentioned in his testimony,[3] he and I worked together as State Department officials during the mid-1960's in the effort to bring the limits of liability under the Warsaw Convention into the 20th Century. In place of a limit of $8,300 and only a presumption of negligence, we helped to move the international airline community to adopt a limit of $75,000 and to accept a system of liability without fault, meaning that a claimant no longer would have to litigate the issue of negligence on the part of the carrier in order to recover damages. The task now—an overdue task—is to bring the Warsaw Convention and aviation disaster litigation in general into the 21st Century.

*Toward a Long Range Solution*

There is no sound reason, as Professor Lowenfeld has said, why DOHSA should be the statutory provision governing litigation brought as a consequence of aviation disasters that occur over the high seas. Nor is there any sound reason why Americans who are victims of aviation disasters should be treated any differently than Americans who are victims of maritime disasters. Neither should be subject to a monetary limit on the damages they can recover in the event of personal injury or death. There should be a federal statute that creates a cause of action and provides for jurisdiction of the federal courts. At best the statute should include a substantive set of rules governing compensation for injury or death; at least a minimum, it should contain a choice of law rule looking to the law of the domicile of the victim. That is the kind of long range solution we should be seeking.[4]

*Toward an Interim Solution*

First, however, it is necessary to focus on an interim solution, which ought to command quick support and no great controversy. Congress cannot reverse the effect of Zicherman merely with the simple fix proposed by the House, that is, making DOHSA inapplicable to aircraft. If the House's solution were to become law, it would create a void on the issue of which law is applicable when an aviation disaster occurs over the high seas. Federal courts might well struggle for years, in protracted litigation, to reach a uniform conclusion as to which law should be applicable to determine damages for the victims. Moreover, for disasters that occur on domestic trips over the high seas, for example on a trip from Phoenix to Miami or from Miami to Washington, D.C., making DOHSA inapplicable might well deprive disaster victims of the only cause of action available to bring a suit.[5]

I believe there is a good interim legislative substitute, that would accomplish most of what is desired by the proponents of the S. 943. Our suggestion would be to leave DOHSA as the basis for jurisdiction, but to make provision for pain and suffering and comparable damages, and (when the Warsaw limits are not applicable) to call for application of the law of the victim's domicile to determine the measure and scope of compensation. Thus, if a person domiciled in Illinois were on a round-trip voyage from Chicago to France and his plane crashed over the ocean or over France, he or his survivors would be entitled to bring an action in the federal district court in Chicago, and that court would apply the law of Illinois to determine the measure and scope of his damages. Similarly, if an Arizona citizen were injured or killed on a flight between Phoenix and Miami and the disaster occurred over the Gulf of Mexico, he or his survivors could bring suit in a federal court in Arizona (or elsewhere in the United States), and the court would apply Arizona law to determine the compensation payable. If, say, a resident of France were the victim of an air disaster and opted to bring suit in a U.S. court, that court would either apply the law of France to determine compensation, or, alternatively, dismiss the case under the doc-

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[1] *Zicherman* v. *Korean Airlines Co.*, 116 S. Ct. 629 (1996).

[2] This statement is directed to the bill as adopted by the House of Representatives on July 28, 1997 as H.R. 2005. S. 943 as introduced in the Senate on June 23, 1997 is slightly different, in that it seeks to preserve remedies available under common law or under state law. It does not, however, provide for any such remedies, and thus does not remove the ambiguities discussed herein.

[3] See p. 00, supra.

[4] While this Hearing and the pending legislation are focused on aviation disasters, the Committee should recall that under 46 U.S. App. § 183, a major disaster aboard a ship could result in shockingly low recoveries for victims or their survivors. Current limitations on damages are based on the value of the vessel after the disaster or $420 per ton.

[5] This is because the *Benjamins* case, see Lowenfeld, supra note 7, which holds that the Warsaw Convention does create a cause of action, would not apply in a non-Warsaw case, such as a voyage between two points in the United States.

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trine of forum non conveniens, on the theory that the claim belonged in a different court at the victim's domicile.[6]

This approach, I submit, would make the outcome of litigation less like a lottery, would improve the chances of expeditious out-of-court settlements, and would provide a result most in keeping with the expectations of passengers. We have no doubt that when passengers board a commercial airplane, if they think about an accident at all, they think in terms of the law of their home state or nation—the place where they made their wills, planned their estates, and leave their surviving family members. I have attached the draft of a bill prepared by Professor Lowenfeld and me that we believe would accomplish this interim goal.[7]

*The Bigger Picture*

I want to turn briefly to what is happening today in the law of compensation for international aviation disasters. It is important that the Committee appreciate that something must be done very soon if we are to make sure that the $75,000 Warsaw limit that was adopted in 1966 does not remain in effect.

In his testimony, Professor Lowenfeld mentioned that we were not altogether proud of our role in raising the Warsaw limits from $8,300 to $75,000, because we never dreamed that the $75,000 limit would remain in effect for over 30 years. There has finally been an effort to modernize the limits. But except for about a dozen U.S. carriers and a handful of foreign carriers, the extent to which that effort has been successful is not clear.

*(a) The Two-Tier System*

Under the initiative of the International Air Transport Association (IATA), both foreign and U.S. airlines tentatively agreed about two years ago to adopt a two-tier system of liability to replace the $75,000 in the 1966 Montreal Agreement.[8] The lower-tier would be one with a limit of liability of approximately $150,000 per passenger under a system of absolute liability, i.e., where the negligence of the carrier could not be placed in issue. In an instance where an airline in international air transportation is downed by a terrorist missile, or where there is no explanation for the disaster (perhaps like TWA 800), this approach would allow a passenger or his survivors to at least recover damages up to $150,000.[9] The second tier would allow unlimited damages, but would be subject to a defense that the airline had not been at fault. If properly implemented, this will constitute a major improvement over the prior situation.

The problem, however, is that until now, only about a dozen U.S. airlines and some seven foreign airlines have filed tariffs with the U.S. Department of Transportation confirming that they have in fact accepted this two-tier approach.[10] A number of foreign airlines have signed an agreement known as the MIA indicating they would adopt the two-tier approach, but for reasons not explained, they have not yet filed tariffs with the DOT demonstrating or confirming their acceptance. Until they do so, there is no certainty that, in the event of a disaster on board those airlines, the two-tier system would replace the $75,000 limit in the 1966 Accord. Moreover, a number of foreign and U.S. airlines have not committed themselves at all to the two-tier system. Should a disaster occur on a flight on one of these carriers in international transportation (a technical concept that may well include a domestic leg of an international journey),[11] U.S. passengers might well be limited to the $75,000 ceiling in the 1966 Accord.

The international picture on liability limits is so profoundly confused that passengers cannot know which airline is, and which is not, still applying low limits of liability. We would urge that the legislation presently under consideration include at least a Sense of the Congress resolution urging the Department of Transportation

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[6] *Compare Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), dismissing an action brought on behalf of Scottish victims of an aircraft accident in Scotland, on the ground that Scotland would be a more suitable forum.

[7] See p. 000, infra.

[8] IATA Intercarrier Agreement on Passenger Liability, 31 October, 1995 (IIA); Agreement on Measures to Implement the IATA Intercarrier Agreement, 30 July, 1996 (MIA).

[9] In contrast, a case involving pure domestic air transportation where the Agreement would not apply and proof of negligence would still be necessary, there might well be no recovery for victims of this type of disaster.

[10] The foreign airlines are British Airways, Air Canada, Canadian Airlines International, Malaysian Airlines, Lufthansa, Air France and Korean Air Lines. KAL filed the tariff only after its recent accident in Guam.

[11] See, e.g., *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y.1950) applying the Warsaw Convention to an accident on a flight from Washington to Dulles with respect to passengers holding tickets to Mexico City.

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to press the remaining domestic and foreign carriers to promptly adept the IATA two-tier system, and to end the confusion and uncertainty prevailing today.

*(b) The Forum and the Applicable Law*

Two other areas equally require change but have been largely ignored so far by the international airline community. One of these is the question of where victims can sue; the other is which law shall apply wherever suit is brought.

*The Fifth Forum*

Regarding the forum, Article 28 of the Warsaw Convention provides only four forums in which victims or their survivors can sue. Under Article 28, for example, an American who flies on Air France Paris-New York-Paris on a ticket purchased in Paris would not be able to sue in the United States, even if the crash occurred over New York and his survivors resided in New York. Twelve American citizens perished in the recent KAL disaster in Guam. Because of Article 28, their survivors can probably not bring suits in the United States to recover for their loss.[12] Several of such cases came up in the KAL 007 disaster where U.S. residents or citizens had purchased round-trip tickets Seoul-U.S.-Seoul. There is no persuasive reason why these American citizens or residents or their survivors should not be able to bring their suits in the courts of this country.

There is an easy solution to this problem—the "fifth forum." It contemplates simply that international carriers will voluntarily agree that, in the event of a disaster, victims will be able to sue in the country where the victim is domiciled, provided the carrier does business there. This solution has been repeatedly recommended to the international aviation community. I understand that the U.S. carriers wanted to adopt the fifth forum in the tariffs they filed with the DOT, but were discouraged from doing so, and ultimately did not give the required consent. The DOT itself actively favors adoption of the fifth forum. There has been little recent progress, however in making sure the fifth forum is adopted.

*Law of the Domicile*

The second area that needs attention concerns the issue of what law will apply to determine a victim's appropriate measure of damages. The legislation we have drafted as an interim solution would, as I have said, provide for adoption of the law of the victim's domicile to determine his or her damages. That is the correct approach, consistent with modern thinking on accident compensation and on conflict of laws. But the proposed interim legislation would apply only when the disaster occurs over the high seas. If the disaster occurred over land, there is no clearly applicable U.S. law. In the current effort to bring the Warsaw convention into the 21st Century, we had hoped that the international aviation community would voluntarily agree to application of the law of the victims' domicile, but up to now only the American carriers have done so, in the tariffs filed with the DOT. The American carriers, together with the DOT, have actively encouraged IATA and its members to adept this approach, but so far without success.

If the legislative amendment we have recommended were enacted, and if the fifth forum together with the law of the domicile were ultimately adopted world-wide by all the major international carriers, the United States would have made great progress towards bringing air law into the 21st Century. On both of these issues a push from Congress would be highly desirable.

*Long Range Solution*

Finally, it is appropriate to look for a long range solution that would treat victims of all maritime and aviation accidents similarly. We ought not only to create a federal cause of action for both types of transportation disasters but also to consider creating a federal law of damages, so that there would be uniformity of law in this critically important field. That is the long range solution I strongly recommend.

How should one go about trying to reach this goal? We would recommend that the Congress establish an ad hoc Joint Committee made up of members of the Commerce and Judiciary Committees, with the assignment of coming up within no more than one year with the draft of a comprehensive Interstate and International Transport Accident Act. This is not an easy project. It will take time, serious study, and much thought. But it is a project whose time has come.

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[12] See, e.g., *Nudo* v. *Sabena World Airlines*, 207 F. Supp. 191 (E.D. Pa. 1962).

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ATTACHMENT TO STATEMENTS OF ALLAN I. MENDELSOHN AND ANDREAS F. LOWENFELD

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:*

Section 2 (46 U.S.C. §762) of the Death on the High Seas Act (46 U.S.C. §761 et seq.) is hereby amended—

(i) by labeling the present section as "paragraph (a)" and deleting the word "pecuniary" before the word "loss"; and

(ii) by adding a paragraph (b) as follows:

(b) recoverable elements of damages awardable to or on behalf of a person injured or killed while a passenger on a flight operated by a commercial air carrier [or a voyage on a commercial vessel] shall be determined by the law of the passenger's domicile.

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PREPARED STATEMENT OF ROBERT FORCE, PROFESSOR OF MARITIME LAW, TULANE LAW SCHOOL AND DIRECTOR, TULANE LAW SCHOOL MARITIME LAW CENTER

I would like to thank the members of the Subcommittee for inviting me to testify on proposed changes to the Death on the High Seas Act (hereinafter DOHSA). Unfortunately, I am unable to testify in person but welcome the opportunity to submit my views in writing. By way of introduction, my name is Robert Force. I am the Niels F. Johnsen Professor of Maritime Law at Tulane Law School, in New Orleans, Louisiana and the Director of the Tulane Law School Maritime Law Center. Among other areas, Tulane Law School specializes in Admiralty and Maritime Law. We are the only law school authorized by the American Bar Association to award an LL.M. in Admiralty degree. Every year we offer at least ten courses on Admiralty and Maritime Law, and conduct numerous continuing legal education programs on a regular basis. I teach several Admiralty courses every year and have done so for many years. In one course among other topics, I cover Personal Injury and Death, specifically including the Death on the High Seas Act and various cases decided thereunder. I am also the co-author of the course book which is used for that course. In addition, I have done extensive research in the area of maritime personal injury and death and have published articles on that subject, several of which have been sent previously to the Subcommittee staff. Having said that, I want to make it clear that the following comments represent only my own professional views based on analyses and opinions that have been stated previously in my publications. I do not speak for Tulane University, its Law School or the Maritime Law Center. I am not a practicing lawyer. I have provided consulting services to lawyers in personal injury cases. Those services have been provided to both plaintiff and defense lawyers. I am a member of both the Maritime Law Association of the United States and the American Trial Lawyers Association. I am involved in some activities of the Maritime Law Association but in matters unrelated to personal injury and death issues. I am not active in the Amorican Trial Lawyers Association.

I understand that the Subcommittee is considering a proposed amendment which would affect the Death on the High Seas Act, specifically an amendment which would allow the recovery of non-pecuniary damages by the survivors of passengers killed on commercial aircraft flights. I believe this proposal raises two issues. First, should DOHSA be amended to allow a decedent's survivors to recover non-pecuniary damages, such as loss of society (sometimes referred to as loss of consortium). Second, if so, should the amendment be restricted to survivors of air crash victims. I should like to address the second issue first. In my opinion any change to DOHSA should apply across the board to all deaths on the high seas. Let me illustrate my point with the following example.

Mr. & Mrs. Jones are very close friends and neighbors of Mr. & Mrs. Smith. The Jones and Smiths decided to go to England for a vacation. Mr. Jones is afraid to cross the ocean on a ship, and the Jones made plans to fly from the U.S. to England. Mr. Smith is afraid to fly across the ocean and the Smiths made plans to take a passenger ship from the U.S. to England. The Smiths left two days before the Jones. The Jones' plane developed engine trouble and crashed into the ocean. Unfortunately it crashed into the Smiths' passenger vessel. Both Mr. Jones and Mr. Smith were killed. Each left a surviving dependent spouse and two surviving dependent children. Is there any rational reason why Mr. Jones' widow and children should be able to recover non-pecuniary damages such as for loss of society, but Mr. Smith's widow and children should be restricted to recovery of their pecuniary loss? I cannot think of any sound reason for distinguishing between the two.

Let me now come to the broader and what I consider the more important issue, that is, whether of not the survivors of persons killed on the high seas should be

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permitted to recover non-pecuniary damages. Under the current law, the sole remedy for both the Jones and Smith widows and their children would be under DOHSA, and they would only be allowed to recover "pecuniary" loss because that restriction is expressly stated in the statute. The present law treats all deaths that occur on the high seas in a consistent manner regardless of whether aircraft or vessels were the means of transport. But there is a glaring inconsistency between the elements of damages recoverable under DOHSA and damages recoverable under the wrongful death statutes in most States. If the Jones and the Smiths had decided to go to St. Louis from New Orleans with the Jones flying and the Smiths taking a river boat and a similar unfortunate event occurred (plane crashed into the boat), a wrongful death action based on State law would be applicable. Under the laws of most States the widows and children would be able to recover some non-pecuniary damages, such as for loss of society. See authorities cited in APPENDIX.

The reason for the incongruity between recovery of non-pecuniary damages under the current State laws and their non-recovery under DOHSA is not difficult to pinpoint. At the time DOHSA was enacted wrongful death remedies were relatively new to common law countries. The view in the U.S. and in England, whose example we followed in enacting wrongful death remedies, was that only pecuniary loss should be recoverable by the survivors of the decedent. Under the common law, prior to the enactment of wrongful death statutes, the cause of action which a person had for personal injuries died with the victim. To overcome this injustice, a statute was enacted by Parliament to give the decedent's survivors a right to recover under this newly created "wrongful death" action. The legislation was authored by Lord Campbell and this legislation was quickly copied in the various states of the United States. These wrongful death statutes were originally referred to as "Lord Campbell Acts."

An issue arose in England as to whether non-pecuniary damages were recoverable under Lord Campbell's Act. It had been argued that loss of society should be recoverable in a death action just as "pain and suffering" was recoverable in person injury actions, notwithstanding both items of damage were "non-pecuniary". Nevertheless, as I discussed in a law review article quoted below, a distinction between allowing recovery in tort law for pain and suffering and disallowing recovery for loss of consortium under wrongful death statutes.

> . . . was made as early as 1852 in *Blake* v. *The Midland Railway Co.* (18 Q.B. 93, 111, 118 Eng. Rep. 35, 41–42 (1852)) the seminal case denying recovery for loss of consortium under Lord Carnpbell's Act. There, Justice Coleridge, stated:
>
> > When an action is brought by an individual for personal wrong, the jury in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss. There may be a calculation of the pecuniary loss by the different members of the family from the death of one of them: but, if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise being given to the ruin of defendants. We must recollect that the Act we are construing applies not only to great railway companies but to little tradesmen who send out a cart and horse with an apprentice.
>
> In this case, in which Lord Campbell himself was a member of the court, the court made it clear that damages for certain non-pecuniary losses, such as loss of consortium, were too speculative because of the difficulties in instructing the jury on the measure of damages. There was also a concern that this element of damages might be too diverting, because it could open the door to all kinds of evidence about the relationship between husband and wife and between parent and children. Finally, there was an apprehension that the damages for loss of consortium could be both unfair, because defendants would be treated differently depending on the number of children, and too burdensome on defendants, so that where a father left behind a large number of children the amount of damages could be ruinous. The court made much of the fact that this wrongful death statute was not restricted to wealthy defendents, such as large railways, but to the ordinary tradesman as well. It was, after all, a general wrongful death statute.
>
> Lord Carnpbell's Act was the model for the original wrongful death statutes in the United States, and it was only natural for American courts to accept the judicial gloss put on that statute by the English courts in cases such as *Blake* v. *The Midland Railway Co.* This interpretation of the newly enacted wrongful death statutes was followed by almost all American courts.

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Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 LA. L. REV. 745, 778–89 (1995).

I have previously expressed the view that:

> . . . if damages for loss of consortium are to be denied, it must be because of some policy relating to their speculative nature, or because of an unwillingness to delve too deeply into family relationships, or to avoid unfairness or unduly burdening defendants. All of these were relied on by the court in *Blake* v. *Midland Railway Co.* Yet, in contrast the to English view, which is still generally hostile to recovery for loss of consortium in both death and in personal injury cases, in virtually every state in the United States, a wife may recover damages for loss of consortium. * * * In other words, all of the reservations expressed originally by the court in *Blake* v. *Midland Railway Co.* in construing Lord Campbell's Act, and later accepted by the Supreme Court . . ., have been repudiated by the general acceptance of allowing recovery for loss of consortium in the states. Not only may wives and children recover for loss of consortium in almost all of the states, but the trend in this country has been to expand recovery for non-pecuniary damages.

Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 LA. L. REV. 745, 780 (1995). See authorities cited in APPENDIX.

At the time DOHSA was enacted it was comparable to and consistent with State laws providing remedies to survivors of persons who had been killed by tortious acts of others. State laws, however, have evolved to permit non-pecuniary recovery. But DOHSA has remained unchanged. This evolution is not insignificant. Compare, for example, the impact of State law on recovery for loss of consortim in two federal cases which I have discussed in a law review article as follows:

> As late as 1963, in *Igneri* v. *CIE. de Transports Oceaniques,* [323 F.2d 257 (2d Cir. 1963)] the Second Circuit Court of Appeals was faced with the issue whether the wife of an injured longshoreman could recover damages for loss of her husband's consortium. The injuries occurred on a vessel in the harbor at Brooklyn, New York. At the time, New York law did not provide a wife with a right to recover damages for loss of consortium resulting from injuries to her husband. That New York law did not recognize such a claim, observed Judge Friendly, was not dispositive because maritime law was controlling. He also stated that, when there was no established rule of maritime law, "admiralty judges often look to the law prevailing on the land." The court then noted that at common law, and until recently in the states, a wife had no right to recover damages for loss of consortium. Furthermore, at the time of *Igneri,* only twelve American jurisdictions recognized a wife's right to recover for loss of her husband's consortium, and nineteen states that had reconsidered the issue since 1950 continued to reject it.

Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 LA. L. REV. 745, 766–67 (1995).

Under these circumstances, the *Igneri* court was unwilling to authorize recovery for loss of consortium. Just 10 years later the United States Supreme Court found that the situation in the States had undergone a dramatic change since Igneri had been decided. Based on this development the Supreme Court in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 587 (1974) held that damages for loss of society could be recovered in a wrongful death action brought under the general maritime law for deaths occurring in State territorial waters. As I have stated previously:

> It is important to note that the *Igneri* decision viewed the loss of consortium issue in a very broad context. It looked not merely at the Jones Act and the few maritime precedents available but placed considerable emphasis on the fact that loss of consortium was not readily available to wives in the United States. Ten years after *Igneri,* the loss of consortlwn issue was considered by the Supreme Court in *Gaudet.* In reaching its conclusion to allow a wife to recover damages for loss of consortium in an action under the general maritime law, a majority of the Court relied on the fact that "[a] clear majority of States . . . have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society." In a footnote the majority opinion stated "that 27 of the 44 state and territorial wrongful-death statutes which measure damages by the loss sustained by the beneficiaries[ ] permit recovery of loss of society."

Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 La. L. REV. 745, 767 (1995).

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It is my view that the issue is not so much whether the survivors of certain classes of persons, such as airplane passengers, killed on the high seas should be permitted to recover damages for non-pecuniary loss, but rather whether DOHSA should provide recovery for non-pecuniary loss for all people killed on the high seas—a position which would bo more in keeping with State wrongful death remedies. In other words, should federal wrongful death law be more consistent with State laws? I can see no reason why recovery in cases where persons are killed on the high seas should be less full than in comparable situations where persons are killed in State waters or on the land. I think that if Congress were now enacting a DOHSA for the first time, it would be appropriate to give some weight to the prevailing State practice of permitting recovery of non-pecuniary damages. See Authorities cited in APPENDIX.

The question, remains then how best to achieve the modification. It appears that the easiest and least complex change would simply be to delete the word "pecuniary" from Section 762 of the present statute. Such a change could not go unnoticed by the courts. In the absence of further guidance, the courts would probably then apply in DOHSA cases the remedies created by the Supreme Court in the Gaudet case, to which I have referred above, in which the Court specifically held that damages for "loss of society" are recoverable under the general maritime law for deaths that occur in State territorial waters.

A second approach would be to specifically include in Section 762 a reference to the general maritime law by adding after the words "pecuniary loss" the additional words "and other damages under the general maritime law, including loss of society." It might not even be necessary to include the present reference to "pecuniary loss" and the substitution of the suggested reference to the "general maritime law" may be sufficient.

A third option would be to keep the present text of the statute but add a provision stating the "remedies provided under State law may be used to supplement the remedies provided in this Act." This would re-create the situation that existed prior to the *Offshore Logistics, Inc.* v. *Tallentire* (477 U.S. 207 (1986)) where the Supreme Court held that State remedies may not be used to supplement DOHSA. The court of appeals had interpreted the reference to State law in Section 767 of DOHSA as preserving wrongful death remedies under State law and as allowing recovery in a DOHSA action to include elements of dwnages authorized under State law. But the Supreme Court disagreed. One way to restore recovery for non-pecuniary damages such as loss of society would be to legislatively overrule the *Tallentire* decision.

All of the changes I have suggested do not address one problem that I believe creates serious infaimess, that is the right of the survivors of seaman to recover non-pecuniary damages. The Supreme Court has held that the survivors of seaman may not recover non-pecuniary damages regardless of where a seaman is killed either under the Jones Act or under the general maritime law including DOHSA actions. The Court did so by stating that courts no longer are concerned for the welfare of seamen and that this is the responsibility of Congress. The Court also specifically referred to the DOHSA restriction of recovery to pecuniary loss. The latter statute was invoked in the interest of "uniformity". I suggest that in the interest of "uniformity" that if some persons (survivors of non-seamen) are permitted to recover non-pecuniary damages then the survivors of all person killed under similar circumstances be afforded the same remedies. This could be accomplished simply by amending Section 761 to read in part: "Whenever the death of a person, including a seaman, . . ."

The final comment I make relates to S 943, a copy of which I have been provided. That Bill refers in Section 40120(c)(1) to "any remedy—(A) under common law; * * *" I think that reference to common law is at best confusing. At "common law" there was no recovery for wrongful death and recovery of non-pecuniary damages such as loss of society somewhat problematical. I think looking backward is a mistake. I believe a more cogent approach would be to bring DOHSA into the mainstream so far as the recovery of non-pecuniary damages, and that the general maritime law as developed in *Gaudet* and State law are the best guides for doing so.

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## APPENDIX

As I wrote previously in a law review article, ". . . virtually every state allows a wife to recover damages for loss of consortium for the injury[111] and the death[112] of her husband. (Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of

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[111] Alabama: *Swartz* v. *United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); Alaska: *Schreiner* v. *Fruit*, 519 P.2d 462 (Alaska 1974); Arizona: *City of Glendale* v. *Bradshaw*, 503 P.2d 803 (Ariz. 1972); Arkansas: *Missouri Pacific Trans. Co.* v. *V.W. Miller*, 299 S.W.2d 41 (Ark. 1957); Colorado: *Crouch* v. *West*, 477 P.2d 805 (Colo. Ct. App. 1970); Connecticut: *Hopson* v. *St. Mary's Hosp.*, 408 A.2d 260 (Conn. 1979); Delaware: *Stenta* v. *Leblang*, 185 A.2d 759 (Del. 1962); Florida: *Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971); Georgia: *Aretz* v. *United States*, 456 F. Supp. 397 (S.D. Ga. 1978); Hawaii: *Lealaimatafao* v. *Woodward-Clyde Consultants*, 867 P.2d 220 (Hawaii 1994); Illinois: *Dini* v. *Naiditch*, 170 N.E.2d 881 (111. 1960); Indiana: *England* v. *Dana Corp.*, 428 F.2d 385 (7th Cir. 1970); Iowa: *Acuff* v. *Schmit*, 78 N.W.2d 480 (Iowa 1956); Kentucky: *Lloyd* v. *Lloyd*, 479 S.W.2d 623 (Ky. 1972); Maine: *McKellar* v. *Clark Equip. Co.*, 472 A.2d 411 (Me. 1984); Massachusetts: *Diaz* v. *Eli Lilly and Co.*, 302 N.E.2d 555 (Mass. 1973); Minnesota: *Dawydowycz* v. *Quady*, 220 N.W.2d 478 (Minn. 1974); Mississippi: *Tribble* v. *Gregory*, 288 So. 2d 13 (Miss. 1974); Missouri: *Novak* v. *Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. 1963); Montana: *Duffy* v. *Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 196 1); Nebraska: *Guyton* v. *Solomon Dehydrating Co.*, 302 F.2d 283 (8th Cir. 1962); Nevada: *General Electric Co.* v. *Bush*, 498 P.2d 366 (Nev. 1972); New Hampshire: *Siciliano* v. *Capitol City Shows, Inc.*, 475 A.2d 19 (N.H. 1984); New Jersey: *Ekalo* v. *Constructive Service Corp. of America*, 215 A.2d I (N.J. 1965); New Mexico: *Roseberry* v. *Starkovich*, 387 P.2d 321 (N.M. 1963); New York: *Millington* v. *Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); North Carolina: *Nicholson* v. *Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980); North Dakota: *Hastings* v. *James River Aerie No. 2337—Fratemal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976); Ohio: *Clouston* v. *Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230 (Ohio 1970); Oklahoma: *Duncan* v. *General Motors Corp.*, 499 F.2d 835 (10th Cir. 1974); Oregon: *Roe* v. *Pierce*, 832 P.2d 1226 (Or. 1992); Pennsylvania: *Hopkins* v. *Blanco*, 320 A.2d 139 (Pa. 1974); Rhode Island: *Mariani* v. *Nanni*, 185 A.2d 119 (R.I. 1962); South Carolina: *Berry* v. *Myrick*, 194 S.E.2d 240 (S.C. 1973); South Dakota: *Hoekstra* v. *Helgeland*, 98 N.W.2d 669 (S.D. 1959); Tennessee: *Kilbourne* v. *Hanzelik*, 648 S.W.2d 932 (Tenn. 1983); Texas: *Whittlesey* v. *Miller*, 572 S.W.2d 665 (Tex. 1978); Vermont: *Hay* v. *Medical Center Hosp.*, 496 A.2d 939 (Vt. 1985); Washington: *Lundgren* v. *Whitney's, Inc.*, 614 P.2d 1272 (Wash. 1980); West Virginia: *King* v. *Bittinger*, 231 S.E.2d 239 (W. Va. 1976); Wisconsin: *Victorson* v. *Milwaukee and Suburban Transp. Co.*, 234 N.W.2d 332 (Wis. 1975); Wyoming: *Weaver* v. *Mitchell*, 715 P.2d 1361 (Wyo. 1986); District of Columbia: *Romer* v. *District of Columbia*, 449 A.2d 1097 (D.C. 1982); Puerto Rico: *Gonzalez* v. *Fireman's Fund Ins. Co.*, 385 F. Supp. 140 (D. P.R. 1974); Guam: *Duenas* v. *Yama's Co., Inc.*, 1991 WL 255834 (D. Guam App. Drv. 1991), aff'd, *Duenas* v. *Yama's Co., Inc.*, 999 F.2d 542 (9th Cir. 1993); Virgin Islands: *Benjamin* v. *Cleburne Truck and Body Sales, Inc.*, 424 F. Supp. 1294 (D. V.I. 1976).

[112] Alabama: *Swartz* v. *United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); Alaska: *Alaska Stat. §09.55.580(c)(4) (1993);* Arizona: *Howard Frarik M.D., P.C.* v. *Superior Court of State of Arizona, In and For Maricopa County*, 722 P.2d 955 (Ariz. 1986); Arkansas: *Jefferson Hosp. Ass'n, Inc.* v. *Garrett*, 804 S.W.2d 711 (Ark. 1991); California: *Pesce* v. *Summa Corp.*, 54 Cal.App.3d 86 (1975); Connecticut: *Conn. Gen. Stat. Ann. §§52–555(a)–(b) (1991);* Colorado: *MacMaster* v. *Coontz*, 623 P.2d 71 (Colo. Ct. App. 1981); Florida: *Ryter* v. *Brennan*, 291 So. 2d 55 (Fla. Dist. Ct. App. 1974); Georgia: *Aretz* v. *United States*, 456 F. Supp. 397 (S.D. Ga. 1978); Hawaii: *Haw. Rev. Stat. §663–3 (1993);* Illinois: *Pfeifer* v. *Canyon Constr. Co., Inc.*, 628 N.E.2d 746 (111. App. Ct. 1993); Indiana: *Dearborn Fabricating and Eng'g Corp., Inc.* v. *Wickham*, 551 N.E.2d 1135 (Ind. 1990); Iowa: *Audubon-Exira Ready Mix, Inc.* v. *Illinois Central Gulf R.R. Co.*, 335 N.W.2d 148 (Iowa 1983); Kansas: *Kan. Stat. Ann. §60–1904 (1993);* Kentucky: *Lloyd* v. *Lloyd*, 479 S.W.2d 623 (Ky. 1972); Louisiana: *La. Civ. Code Ann. art. 2315.1 (West 1994);* Maine: *Phillips* v. *Eastern Maine Medical Ctr.*, 565 A.2d 306 (Me. 1989); Maryland: *Md. Cts. & Jud. Proc. Code Ann. §3–904 (1993);* Massachusetts: *Mass. Gen. Laws Ann. ch. 229, §2 (West 1994); Hallett* v. *Town of Wrentham*, 499 N.E.2d 1189 (Mass. 1986); Michigan: *Mich. Comp. Laws Ann. §600.2922 (West 1986);* Minnesota: *Roers* v. *Engebretson*, 479 N.W.2d 422 (Minn. Ct. App. 1992); Missouri: *Mo. Ann. Stat. §537.090 (Vernon 1988);* Montana: *Swanson* v. *Champion Intern. Corp.*, 646 P.2d 1166 (Mont. 1982); Nebraska: *Anson* v. *Fletcher*, 220 N.W.2d 371 (Neb. 1974); Nevada: *Nationwide Mutual Ins. Co.* v. *Moya*, 837 P.2d 426 (Nev. 1992); New Jersey: *Sykes* v. *Propane Power Corp.*, 541 A.2d 271 (N.J. Super. Ct. App. Div. 1988); New Mexico: *Romero* v. *Byers*, 872 P.2d 840 (N.M. 1994); New York: *Ciaccio* v. *Housman*, 97 Misc. 2d 741 (N.Y. Sup. Ct. 1979); North Carolina: *Keys* v. *Duke University*, 435 S.E.2d 820 (N.C. Ct. App. 1993); North Dakota: *Hopkins* v. *McBane*, 427 N.W.2d 85 (N.D. 1988); Ohio: *Ohio Rev. Code Ann. §2125.02 (Anderson 1993);* Oklahoma: *Littlefield* v. *State Farm Fire and Casualty Co.*, 857 P.2d 65 (Okla. 1993); Oregon: *Roe* v. *Pierce*, 832 P.2d 1226 (Or. 1992); Pennsylvania: *Bonavitacola* v. *Cluver*, 619 A.2d 1363 (Pa. Super. Ct. 1993); Rhode Island: *Cobe* v. *Hersey*, 576 A.2d 1226 (R.I. 1990); South Carolina: *S.C. Code Ann. §15–75–20 (Law. Co-op. 1991);* Tennessee: *Kilbourne* v. *Hanzelik*, 648 S.W.2d 932 (Tenn. 1983); Texas: *Missouri Pacific R. Co.* v. *Dawson*, 662 S.W.2d 740 (Tex. Ct. App. 1983); Vermont: *Clymer* v. *Webster*, 596 A.2d 905 (Vt. 1991); Virginia: See, cf., *Basham* v. *Terry*, 102 S.E.2d 285, 291 (Va. 1958); Washington: *Christie* v. *Maxwell*, 696 P.2d 1256 (Wash. Ct. App. 1985), rev. denied, 104 Wash. 2d 1002 (1985); West Virginia: *Belcher* v. *Goins*, 400 S.E.2d 830 (W. Va. 1990); Wisconsin: *Jaeger* v. *Raymark Indus., Inc.*, 610 F. Supp. 784 (E.D. Wis. 1985); Wyoming: *Weaver* v. *Mitchell*, 715 P.2d 1361 (Wyo. 1986); District of Columbia: *Romer* v. *District of Columbia*, 449 A.2d 1097 (D.C. 1982); Puerto Rico: *LaForest* v. *Autoridad de Las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443 (1st Cir. 1976).

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Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 La. L. Rev. 745, 768–69 (1995).

Although the research for this article was done several years ago and the law in some States may have changed, I would be surprised if the situation in 1998 is much different.

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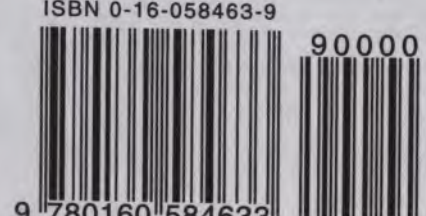


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